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That newspapers have no absolute right to obtain copies of the proceedings in a divorce suit for the purpose of publication is a well settled proposition lately recognized by the Supreme Court of Rhode Island, in *In re* Caswell. At common law every person is entitled to the inspection, either personally or by his agent, of public records, provided he has an interest therein which is such as would enable him to maintain or defend an action for which the document or record sought can furnish evidence or necessary information. It is not essential, however, "that the interest be private, capable of sustaining a suit or defense on his own personal behalf, but it will be sufficient that he act in such suit as the representative of the common or public right." By statute of the United States and also several of the States, the necessity of interest has been done away with, and any person may examine public records, and take memoranda therefrom. *In re* Chambers, 44 Fed. Rep. 786; State v. Rachac, 37 Minn. 372, 35 N. W. Rep. 7; Hanson v. Eichstaedt, 69 Wis. 538, 35 N. W. Rep. 30; Lum v. McCarty, 39 N. J. Law, 287; Newton v. Fisher, 98 N. C. 20, 3 S. E. Rep. 822. As there is no such statute in Rhode Island the court considered that the common law rule, as above stated, is in force. Whether they were willing to go to the full extent thereof, they did not feel called upon to decide. But they concluded that it was clearly within the rule to hold that no one has a right to examine or obtain copies of public records from mere curiosity, or for the purpose of creating public scandal. To publish broadcast the painful, and sometimes disgusting, details of a divorce case, not only fails to serve any useful purpose in the community, but, on the other hand, directly tends to the demoralization and corruption thereof, by catering to a morbid craving for that which is sensational and impure. All will agree with the court that "the judicial records of the State should always be accessible to the people for all proper purposes, under reasonable restrictions as to the time and mode of examining the same; but they should not be used to gratify private spite or promote public scandal."

The *Australian Law Times*, discusses in an entertaining manner the question whether or not a young lady who breaks her leg at a dance can maintain an action against her partner on the ground that it was caused by his clumsiness. The writer intimates the opinion that a man who asks a girl to dance does not undertake to return her to her chaperon in as good order and condition as he receives her—"act of God and the Queen's enemies excepted"—but that at most his liabilities are those of a gratuitous bailee not extending beyond gross negligence. Or looking at the case from another side, that there is no implied warranty on his part that he is reasonably fit for the purpose for which he offers himself as a partner for a dance, as there is no sufficient consideration moving from her to him to support such a warranty. A further point raised is whether or not she did not voluntarily assume the risk of his unfitness. The writer adds that these questions were very fully gone into "in the somewhat analogous case of the bailment of a cab-horse, Fowler v. Locke, L. R. 7 C. P. 272, 9 C. P. 751, note, 10 C. P. 90."

The United States Circuit Court of Appeals of Louisiana, has decided against the claims of certain relatives of the Italians who were killed in New Orleans in 1891 in the assault in the parish prison, for the recovery of damages from the city for their death. The opinion of the court was delivered by Judge Pardee, the other two judges concurring. The court decided that under the treaty of 1871 with Italy, Italians resident in this country are entitled to exactly the same sort of legal protection as citizens, and no more; that there is no common law right to sue a State or city for damages for the loss of either life or property through riots; that for such a right to exist it must be created by statute; that a statute makes the city of New Orleans liable for damage done by mobs to property, but makes no mention of municipal liability for the loss of life; that therefore this liability does not exist, and horrible as the crime was, there is no remedy for it in a civil action.

NOTES OF RECENT DECISIONS.

RECEIVERS—LEASE EXTENDING BEYOND RECEIVERSHIP.—In Chicago Deposit Vault Co. v. McNulton, 14 S. C. Rep. 915, decided by the Supreme Court of the United States it appeared that the order appointing a receiver of a railroad authorized him to make all contracts necessary in carrying on its business, subject to the supervision of the court, and to make payments of current expenses and other designated charges. It was held that this conferred no authority to enter into a lease of offices, involving large expenditure, extending beyond the receivership; that the court's approval of his reports, showing payments of rent for offices but not disclosing the existence of such lease, was not a confirmation thereof; and that the lessor had no equitable right to the rent after termination of the receivership, as against purchasers of the railroad under decree of the court. The court said *inter alia:*

It is undoubtedly true that a receiver, without the previous sanction of the court, manifested by special orders, may incur ordinary expenses or liabilities for supplies, material or labor needed in the daily administration of railroad property committed to his care as an officer of the court; but it seems equally well settled that the courts decline to sanction the exercise of this discretion on the part of receivers in respect to large outlays, or contracts extending beyond the receivership, and intended to be binding upon the trust. The receiver being an officer of the court, and acting under the court's direction and instructions, his powers are derived from and defined by the court under which he acts. He is not such a general agent as to have any implied power, and his authority to make expenditures and incur liabilities like the one in question must be either found in the order of his appointment, or be approved by the court, before they acquire validity and have any binding force upon the trust.

In Cowdrey v. Railroad Co., 93 U. S. 352, it was held that a receiver is not authorized, without the previous direction of the court, to incur any expenses, on account of property in his hands, beyond what is absolutely essential to its preservation and use, as contemplated by his appointment. Accordingly, the expenditures of a receiver to defeat a proposed subsidy from a city, to aid in the construction of a railroad parallel with the one in his hands, were properly disallowed in the settlement of his final account, although such road, if constructed, might have diminished the future earnings of the road in his charge.

This same general principle is recognized in Union Trust Co. v. Illinois M. R'y Co., 117 U. S. 434, 479, 6 Sup. Ct. Rep. 809, where debts for considerable sums of money, borrowed by the receiver without previous authority from the court, were not allowed any priority out of the trust fund, although the moneys borrowed were applied to pay expenses of the receivership, such as supplies, repairs and pay rolls, and to replace moneys which had been so applied, for the reason that no order of the court had been obtained to borrow funds for those purposes.

In Lehigh Coal & Navigation Co. v. Central R. Co., 35 N. J. Eq. 426, it was said that "the receiver may undoubtedly appropriate moneys in his hands, belonging to the trust, to such purposes connected with the trust as he may think proper, always taking the risk that the court will finally approve his action; but he has no authority to bind the trust by contract without the authority of the court. Until his contracts are approved and ratified by the court, the court is at liberty to deal with them as to it shall appear just, and may either modify them, or disregard them entirely. • • • All persons dealing with receivers do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court."

This states the correct rule upon the subject, especially in respect to contracts involving large outlays, and which may extend beyond the life of the receivership. The same general rule is stated in Beach on Receivers (section 257) as follows: "But a receiver is not allowed to exercise his discretion in applying the funds in his hands. These he holds strictly subject to the direction of the court, and only to be disposed of upon its order. Neither can he enter into contracts without the approval of the court. Although, as receiver, he may enter into negotiations and make such agreements as would be binding upon him as an individual, yet, in order to affect the fund in his hands, his acts must be ratified by the court. This rule is so well established that it has been decided that all persons contracting with a receiver are chargeable with knowledge of his inability to contract, and enter into contracts with him at their own peril, and that the court has unquestioned power to modify, or even vacate his agreements." To the like effect is a statement of the rule made in section 186 of High on Receivers.

JUDGMENTS—FOREIGN JUDGMENTS — CONCLUSIVENESS.—The Supreme Court of Pennsylvania decide in Price v. Harrell, that in an action on a foreign judgment defendant may, notwithstanding the recitals of the record show that there was no service on or appearance by him. Mitchell, J., says:

How far section 1 of article 4 of the Constitution of the United States, and the act of congress of May 26, 1790, passed to carry it into effect, operate to preclude a defendant from offering evidence against the judgment of one State when sued upon it in another, has been the subject of much discussion and difference of opinion. A distinction has always been made, however, between facts going to the jurisdiction of the court and those relating to the merits, and the tendency has been strong to open the door to evidence upon the former. The earlier view was that the mere presumption in favor of jurisdiction might be contradicted, but that evidence could not be received against the affirmative recitals of jurisdictional facts in the record. In Hampton v. M'Connel, 3 Wheat. 234, Chief Justice Marshall said: "Whatever pleas would be good to a suit thereon in such State, and none others, could be pleaded in any other court in the United States." And a similar view is indicated by the decisions in Mills v. Duryee, 7 Cranch, 481 (as to which see the remarks of Bradley, J., in Thompson v. Whitman, 18 Wall. 462), and Landes v. Brant, 10 How. 348, 371: "It was undoubtedly the purpose [of

the constitutional provision] to give to the judicial proceedings of each State the same faith and credit in every other State to which they were entitled in the State in which they took place." Story, Const. § 1310, note. In Thompson v. Whitman, 18 Wall. 457, however, the question came directly before the Supreme Court of the United States, and Justice Bradley, admitting that there was no previous express decision on the point made an elaborate review of all the authorities, and announced for the court the conclusion that jurisdiction was always open to question, even upon facts affirmatively asserted in the record. This decision was affirmed and followed in Knowles v. Code Co., 19 Wall. 58, and Pennoyer v. Neff, 95 U. S. 714, and has been considered as settling the law, by the highest court on the subject. The great weight of authority in the State courts is to the same effect, and so are the text books. McDermott v. Clary, 107 Mass. 501; Gilman v. Gilman, 126 Mass. 26; Wright v. Andrews, 130 Mass. 149; Sewing Machine Co. v. Radcliffe, 66 Md. 511, 8 Atl. Rep. 265; Manufacturing Co. v. Chambers, 75 Md. 614, 23 Atl. Rep. 1024; Eager v. Stover, 59 Mo. 87; Napton v. Leaton, 71 Mo. 358; Whart. Confl. Laws, § 823; Story Confl. Laws, § 609; Story Const. (M. M. Bigelow's Ed. 1891) § 1310, note *a*; 12 Am. & Eng. Enc. Law, 148*r*, and cases there cited. Our own cases have not been in entire harmony. In Wetherill v. Stillman, 65 Pa. St. 105, the earlier doctrine was enforced with great strictness, and, the record reciting an appearance by counsel, it was held —Sharwood, J., dissenting—than an affidavit by defendant that he had never been served with process, or authorized any one to appear for him was not sufficient to prevent judgment; Thompson, C. J., saying: "The recital shows conclusively the jurisdiction of the parties; · · · consequently the defendant's affidavit in this particular amounted to nothing against the record to which it referred." In Noble v. Oil Co., 79 Pa. St. 354, however, it was held that, notwithstanding the recital in the record of an attachment *in rem* in New York, it might be shown that the property was not there, and the court therefore acquired no jurisdiction. And in Guthrie v. Lowry, 84 Pa. St. 533, it was distinctly held that, "whatever doubts may have been at one time entertained, it is now an incontrovertible position · · · that the record may be contradicted by evidence of facts impeaching the jurisdiction of the court;" citing, among others, the cases in 18 and 19 Wall. *supra*, though in the particular case the foreign court was held, as a matter of law, to have had jurisdiction. This would seem to be a formal recognition and adoption, even if partially obiter, of the later, and presently prevailing doctrine. But in Lance v. Dugan (Pa. Sup.) 13 Atl. Rep. 942, the court again reverted in a brief per curiam to the old rule, saying that, as the record showed a service on defendants, the judgment was conclusive, notwithstanding an affidavit in denial. In this condition of the law we have the point in the present case for final settlement. Whatever our individual views upon the true spirit of the constitutional provision, we have no hesitation in conforming to the prevailing rule. It would be sufficient to say that it is now the established rule in the Supreme Court, which is the ultimate authority on all questions depending on the Constitution and Statutes of the United States. But, in addition to that, the same rule now prevails in the courts of a majority of the States, and it is a question on which uniformity is desirable. It would be contrary to sound policy to deny to our own citizens a defense against judgments obtained in other States out of a comity which such States refused to us. An apt illustration is afforded by the present case, in which it appears that the court of chancery in Maryland denied the appellant relief against the original judgment on the ground that the same defense would be open to him here. The affidavit of defense avers that the appearance recited in the record of the judgment sued on was merely constructive, and that in fact the appellant was not served with process, did not appear, and had no knowledge of the suit until recently, when demand was made upon him for payment. These being facts going to the jurisdiction of the court, the record could be contradicted in regard to them. The affidavit presented a *prima facie* defense, and was sufficient to prevent judgment. Judgment reversed, and *procedendo* awarded.

NEGLIGENCE—ACCIDENTAL SHOOTING WHILE HUNTING.—In Hawkins v. Watkins, 28 N. Y. Supp. 867, decided by the Supreme Court of New York, it was held that one who negligently shoots another while hunting is liable for the injury caused thereby, though he did not know of the presence of such other person. The court said in part:

This action was for negligence. The plaintiff claimed, and the evidence given in his behalf disclosed, that, on the 14th day of October, 1889, he and his brother went to the head of Cayuga lake, duck hunting; that they took with them two tame ducks to be used as decoys; that, while they were preparing to anchor them as such decoys, one of them escaped from the boat in which they were, and the plaintiff and his brother pursued it; that, while doing so, the defendant shot at them and seriously injured the plaintiff; that the accident occurred a few minutes before 6 o'clock in the morning; that it was clear, and broad daylight, being about fifteen or twenty minutes before sunrise; that between the place where the defendant stood when he fired and the boat in which the plaintiff and his brother were there was nothing to obstruct the defendant's vision, so that, if he had looked before firing, he would have seen the plaintiff, his brother, and the boat in which they were at the time. The evidence of the defendant was somewhat in conflict with that of the plaintiff, and tended to show that it was not sufficiently light at the time to enable him to see the plaintiff, and that his vision was obstructed by the limbs of the trees and shrubs that stood between him and the plaintiff. The question whether the transaction was as claimed by the plaintiff, or as claimed by the defendant, was submitted to the jury, and it found in favor of the plaintiff. Therefore, in examining the question of the defendant's negligence and the plaintiff's freedom from contributory negligence, we must regard the facts proved by the plaintiff as the established facts in this case. Assuming the transaction to have occurred in the manner testified to by the plaintiff and his witnesses, it is quite obvious that both the question of the defendant's negligence and the question of the plaintiff's freedom from contributory negligence were questions of fact that were properly submitted to the jury, and that its findings thereon should be regarded as final. The appellant, however, insists that the rule of law applicable to this case is that "one who is hunting in a 'wilderness' is not bound to anticipate the presence, within range of his shot, of another man, and is not liable for an injury caused unintentionally by him to a person of whose presence he was not aware," and

cites 4 Wait, Act. & Def. 702, and Bizzell v. Booker (16 Ark. 308), to uphold his insistence. When we examine the Bizzell case we not only find that the facts in that case were wholly unlike those in the case at bar, but that all that was held in that case was that where a person was doing a lawful act, or an act not mischievous, rash, reckless, or foolish, and naturally liable to result in injury to others, he was not responsible for damages resulting therefrom, by accident or casualty, while he was in the exercise of such care and caution as a prudent man would observe, under the circumstances surrounding him, to avoid injury to others. We also find that in that case it was expressly held that such a person would be answerable for damages which resulted from his negligence or want of such care and caution on his part. Referring to Wait's Actions and Defenses, we find the statement above quoted, and that the Bizzell case is the only authority cited to sustain it. We fail to see how the doctrine of the Bizzell case in any way aids the defendant, but, on the contrary, it seems to be an authority in favor of the plaintiff, as the court in that case expressly indorsed the doctrine laid down by Bronson, C. J., in Vandenburg v. Truax (4 Denio, 464), as follows: "It may be laid down as a general rule that when one does an illegal or mischievous act which is likely to prove injurious to others, and when he does a legal act in such a careless and improper manner that injury to third persons may probably ensue, he is answerable, in some form of action, for all the consequences which may directly and naturally result from his conduct. . . . It is not necessary that he should intend to do the particular injury which follows, nor, indeed, any injury at all."

In Shear. & R. Neg. Sec. 686, it is said: "A very high degree of care is required from all persons using firearms in the immediate vicinity of other people, no matter how lawful, or even necessary, such use may be." And the case of Weaver v. Ward, Hob. 134; Castle v. Duryee, 1 App. Dec. 327; Moody v. Ward, 13 Mass. 299; McClenaghan v. Brock, 5 Rich. Law, 17; Haack v. Fearing, 5 Rob. 528; and Moebus v. Becker, 46 N. J. Law, 41, are cited to sustain that proposition. Cooley, in his work on Torts, says: "When one makes use of loaded weapons, he is responsible only as he might be for any negligent handling of dangerous machinery; that is to say, for a care proportioned to the danger of injury from it." Under the circumstances disclosed by the evidence in this case, and upon the authorities bearing upon the question of the defendant's liability, we think there is no doubt of the plaintiff's right to recover in this action.

FOLLOWING TRUST FUNDS UNDER THE SO-CALLED MODERN DOCTRINE OF EQUITY.

The later equitable doctrine of the right of *cestuis que trustent* to follow trust property into insolvent estates and recover the same, either by way of collecting out of the cash in the assets, or by preferential lien on all the assets of the estate to be paid out of the first moneys received, to the exclusion of all the general creditors in either case, is not clearly defined. But the right itself is denied by eminent authority.[1] Perhaps much of the confusion arises from unguarded language in the decisions while a desire to expand the "modern doctrine of equity"[2] is perhaps responsible to a degree. The line of cases desired to be noticed particularly herein is where custodians of public funds have deposited them in banks which afterwards become insolvent. It is held that a public treasurer is the trustee of an express trust.[3] It is said that in the absence of a permissive statute, it is unlawful *ipso facto* to deposit generally public funds in a bank,[4] because, in making a general deposit of such moneys, the treasurer is simply lending the same to the bank,[5] which he has no right to do. As between the banker and treasurer the relation of debtor and creditor exist,[6] but some cases maintain that, regardless of the responsibility of the bondsmen of the treasurers, or of the bondsmen of the bankers receiving the deposits, the *cestuis que trustent* may follow the funds and recover them.[7] Right here a divergence arises. Some of the cases (*a*) have sustained blind liens against the assets of insolvent estates, without regard to tracing or identification of funds or property, but simply upon proof that trust funds went into the business of an insolvent bank prior to failure, and therefore, it is to be presumed that as the trust funds swelled the assets *pro tanto*, the estate has had the benefit and must restore; other de-

[1] Ills. Trust Bk. v. First Nat. Bk., 15 Fed. Rep. 858 (1883).

[2] Jessell, M. R. in Knatchbull v. Hallett, L. R. 13 Ch. Div. 696, 709 (1879).

[3] McClure v. Bd. of Coms. (1893), 34 Pac. Rep. 763; State v. McFetridge (1893), 54 N. W. Rep. 1.

[4] Meyers v. Board of Ed. (1893), 32 Pac. Rep. 658; San Diego Co. v. Calif. Nat. Bk. (1892), 52 Fed. Rep. 59; *Contra*, State v. McFetridge, 54 N. W. Rep. 1.

[5] Boone on Bkg. 39; Cragie v. Hadley (1885), 99 N. Y. 131; Metrop. Nt. Bk. v. Loyd (1892), 90 N. Y. 530; Bolles on Bks. and Depositors, 1; Lowry v. Polk Co. (1879), 49 N. W. Rep. 1049; Ind. Dist. of Bover v. King (1890), 45 N. W. Rep. 908.

[6] Cadwell v. King (1892), 50 N. W. Rep. 975; Bolles on Bks. and Dep. 33-4; Morse on Banking, 289.

[7] Ind. Dist. of Boyer v. King (1890), 45 N. W. Rep. 908; Meyers v. Board of Ed. (1893), 32 Pac. Rep. 658; San Diego Co. v. Cal. Nat. Bk. (1892), 52 Fed. Rep. 59; Fuelinghuysen v. Nugent (1888), 36 Fed. Rep. 230; Nat. Bk. v. Insurance Co. (1881), 104 U. S. 54; Bank v. King, 57 Pa. St. 202; Holmes v. Gilman (1893), 138 N. Y. 369, 34 N. E. Rep. 205; Knatchbull v. Hallett (1879), 13 Ch. Div. 696; Davenport Plow Co. v. Lamp (1890), 45 N. W. Rep. 1049; Bank v. King and Knatchbull v. Hallett, distinguished; *In re* Columbian Bank, 23 Atlantic Rep. 625 (1893).

cisions (*b*) award recovery of trust funds only when they are the proceeds thereof, are clearly traced and identified in the hands of the receiver or assignee. (*a*) Neither Perry nor Flint in their works on Trusts (1889 and 1890, respectively), refer to this proposition. It doesn't exist, so far as they are concerned. The cases are probably to be found in the reports only; and they are all comparatively new, though some of them bear date before 1889. However, one gets no hint from these two late text books as to blind liens, if I may so term them, for want of a better designation.[8] A complete history of the law of following trust funds, may be found in several articles published in the CENTRAL LAW JOURNAL heretofere,[8a] and they state the law as it was interpreted at the time of their publication. They should be read, in order to get a full understanding of the subject. In Kansas,[9] the Supreme Court went as far as it was possible to go in declaring a priority of lien. The treasurer of a school district had deposited public funds in a bank which afterwards failed. The bank owed on the deposits $3,265.71 at the time it closed, and turned over $1,531.57 in cash to the assignee. The trust fund could not be traced further than into the general funds of the bank where the deposits were made. It was presumed by the court that the deposits went into the estate. It says: "It would seem to be immaterial whether the property with which the trust funds were mingled, was moneys, or whether it was bills, notes, securities, lands or other assets." The bank which assigned in this case, appears to have been engaged in general business, and its assets consisted of moneys, securities and lands; and as the estate was augumented by the conversion of the trust funds, no reason is seen under the equitable principle, which has just been mentioned—the modern doctrine of equity—why they should not become a charge upon the entire estate." It will be observed that the court specially based its decision on the "modern doctrine of equity," so styled by Jessell. Peak v. Elliott,[10] is a case where a petition was sustained as against the demurrer, the court holding that upon proof of facts as alleged, plaintiff was entitled to a decree of priority against the assets of the insolvent bank. Plaintiff had paid for his note, which the bank had originally discounted, but had rediscounted to another bank, and was not the owner at that time. It failed to pay the note, and plaintiff was to lift it. He prayed for a trust as against the assignee for the amount which he paid to the failing bank. It was not alleged how much money the assignee received, nor was a tracing or identification of the fund alleged. In Missouri, there was a case of principal and agent.[11] The Missouri Valley Bank acted as agent for Harrison in making loans, and H sent draft for $4,500 for that purpose. The bank cashed the draft and the proceeds went into its own funds just before the bank failed. The court awarded judgment for $3,150, without tracing or identification, and decreed priority of payment. It does not appear why the judgment was less than the claim, nor what amount of money was turned over to the assignee. In Iowa,[12] the court say: "It does not appear that any of the identical money deposited went into the possession of the defendant (the assignee). On the contrary, the admitted facts justify the conclusion that he received but little, if any of it, and, if a trust for the amount in question is established, it must be on the ground that the deposits must be held to have increased the estate of the insolvent, and that the balance due is represented by an increase now in the hands of the assignee." In this case the amount of cash in the hands of the assignee was $835.-61; the claim of the plaintiff district was $557.17. The money having gone into the bank, "it will be presumed, in the absence of a showing to the contrary, that it was preserved by them in some form and that it passed into the hands of their assignee." In another case in Iowa,[13] the court gave the plaintiff a prior claim on the assets of the estate for trust funds loaned to it and thus

[8] Lien, "a hold or claim which one person has upon the property of another, as a security for some debt or charge;" 80 Va. 418.

[8a] 5 C. L. J. 51, 75; 25 C. L. J. 315; 31 C. L. J. 125, 145.

[9] Myers v. Bd. of Ed. (1893), 32 Pac. Rep. 658.

[10] 1 Pac. Rep. (1883) (Kan.) 499; substantially to same effect is Elliott v. Barnes (Kan. 1883), 1 Pac. Rep. 267.

[11] Harman v. Smith, 83 Mo. 210.

[12] Ind. Dist. of Boyer v. King (1890), 45 N. W. Rep. 908; this case modified, see note 22 below.

[13] Davenport Plow Co. v. Lamp (1890), 45 N. W. Rep. 1049.

postponed other claims held by the lower court to be prior. It appears there was sufficient cash in the estate to pay plaintiff, though the funds were not traced further than into the concern before it failed. "The right of recovery," said the court "would not depend upon the ability of plaintiff to trace money (the identical coins) paid by its treasurer, and discover them in the hands of the Globe Plow Works. That right is based upon the facts that trust funds came into its hands, of the trust character of which it had full knowledge." * * * "The money was wrongfully mingled, as it were, with the assets of the company." In a well known Wisconsin case,[14] a draft was collected, and before the owner of the draft called for the proceeds, the collecting bank failed. It was not shown that any moneys realized from the draft ever went into the hands of the assignee in any manner. The majority of the court held that a trust was impressed upon the entire estate. In this case the relation of the bank and owner of the draft was clearly that of principal and agent. There is a dissenting opinion in the case by Judge Cassoday, concurred in by Justice Taylor. They held that "the amount of the equitable charge upon the assets ought not, upon any principle of equity, to exceed the amount of benefit to the estate derived from the draft and its proceeds. In so far as the assets of the estate in the hands of the assignee are held chargeable beyond the amount of benefit which the estate derived from the draft or its proceeds, the equitable doctrine of the cases cited, and many others which may be cited, has, as it seems to me, been misapplied. I cannot join in sanctioning such a departure from a rule as well established and thoroughly equitable." (*b*) Mr. Beach, in his work on Equity Jurisprudence,[15] lays down the rule distinctly that trust funds must be traced into, or identified in, the estate sought to be charged, not traced alone into the hands of the bankrupt who failed, but into his estate, the estate being that which went into the hands of the receiver or assignee. Mr. Beach says that it "is not required to show into what particular asset of the bank this went, but need only show that it went into such assets in some form, thus increasing them in that amount. But it must be shown that in some form or another the trust fund went into the property which is sought to be charged."[16] He makes no mention of the proposition that once a trust fund is traced into the hands of a person who afterwards fails that a blind lien will lie against the entire assets of his estate, without identifying it in the estate in some form. On the contrary, Mr. Beach is in harmony with the current of authorities following: In a very late case, the Supreme Court of Mississippi,[17] refused to decree a blind lien. The sheriff of a county, without authority, deposited tax funds in a bank which knew the character of the funds, and which failed soon thereafter. The cash that came into the hands of the receiver was less than the amount of the tax fund so deposited, and it did not appear that the fund or any part of it came into the receiver's hands, either in its original form or as part of the mass of the bank's assets. Held, that the facts did not justify the payment of such funds out of the assets in the receiver's hands in preference to the claims of other creditors of the bank. The court reviews all the so-called "modern doctrine of equity" cases sustaining blind liens and specifically denies them, saying "in our opinion they are not sound in principle, and are departures from the well settled course of decisions" * * * "but it is not true that the courts have generally abandoned the fundamental principle which controls in the application of the rule and have substituted another and totally different one." In the cases cited by counsel for appellant the principle has been misapplied, or overlooked; in some of them, it is apparently abandoned. In this case, the plea averred that "it is impossible to trace into the hands of the receiver any of the money deposited by John L. Griffin, either as contributing a part of said sum of $368.70 received by said receiver, or as constituting any part of the other assets of the bank received by said receiver." The court con-

[14] McLeod v. Evans (1886), 28 N. W. Rep. 173; to same effect, Francis v. Evans, 33 N. W. Rep. 93 (Wis. 1887); dissent by Cassaday and see below.

[15] 1 Beach Eq. Jur. Secs. 284-5-6.

[16] Among the cases cited by Mr. Beach, besides those contained herein are: Englar v. Offutt, 70 Md. 78; 14 Am. St. 332; Dows v. Kidder, 84 N. Y. 121; Baker v. New York Nt. Bk., 100 N. Y. 31; Staller v. Coats, 88 Mo. 210; Bundy v. Montenllo, 34 Ind. 119; McLaughlin v. Fulton, 104 Pa. St. 161; Farm. Mech. Bk. v. King, 57 Pa. St. 202.

[17] Shields v. Thomas (1894), 14 South. Rep. 84. See Little v. Chadwick, 151 Miss. 110, 23 N. E. Rep. 1005.

cludes: "Giving to the plea its legitimate effect, it follows that all relief was properly denied to the petitioner, because it cannot be shown that the fund deposited by the tax collector, or any part of it, is in the hands of the receiver, either in its original or transmuted form, or a part of the mass of the assets of the bank."

In a Texas case,[18] the plaintiff endeavored to obtain a preference lien on the assets of an insolvent bank in the hands of a receiver to secure payment of certain trust notes that had been converted by the insolvent bank, the receiver having sufficient cash on hand to pay the same, but the court denied it saying: "On the other hand to allow a like priority for payment for the conversion of the renewed notes, would be to diminish the assets, which the insolvent bank both legally and equitably owned to repay trust money, which merely went to pay its debts. These payments may have gone to benefit its estate in one sense; but they did not contribute to swell the assets." It was further held that to give a general lien, "would be to declare that every one who receives the money of another in a fiduciary capacity, and expends it in the payment of his own debts, thereby creates a lien upon the entire estate in favor of the owner of the money so expended. But this is clearly contrary to the doctrine of constructive trusts. The true rule is that the estate must be clearly traced into other specific property, in order that the *cestui que trust* may claim either the property itself or a lien upon it. This is the doctrine uniformly applied in the older cases and laid down by the text-writers upon the law of trusts." The court cites 2 Perry Trusts, Sec. 835 *et seq.;* 2 Story Eq. Jur. Sec. 1258; 2 Pom. Eq. Jur. Sec. 1051. Judge Wallace held in a case in the northern district of New York,[19] that where a bank took a draft for collection knowing that it must suspend in a few days, and instead of remitting the proceeds as requested, mingled the sums with its own funds before it actually did suspend, it is incumbent upon the complainant to trace the funds misappropriated into the hands of the receiver substantially appointed for the insolvent bank, before the latter can be charged with recognizing complainant's equitable title thereto; that a *cestui que trust* cannot follow his fund into the hands of an assignee in bankruptcy or of an executor of such trustee, but must occupy the position of a general creditor of the estate. A county treasurer died short in his accounts,[20] and it was sought to charge his estate with the shortage on the assumption that he had mingled the public trust or funds with his own. The court held that the funds could be followed wherever they could be traced, but said there was no evidence to show in the slightest degree that the money sought to be recovered was invested in any of the property that came into the possession of the appellant. On the contrary, evidence was introduced by them that all the property of which their intestate died seized was owned by him prior to July 2, 1888, or was property that he had received in exchange for other property that he owned prior to that time. That the lower court had held, upon proof alone that the treasurer received the moneys, the presumption was that he mixed them with his own and that therefore all of his assets were impressed with the trust. The Supreme Court distinctly declared against this presumption and approvingly quoted Sherwood v. Bank, (Mich.), 53 N. W. Rep 923, that trust funds must be clearly traced into the hands of the person sought to be charged. In a case in the United States Circuit Court S. D. Ohio,[21] Judge Jackson, (now of the United States Supreme bench) laid down the rule as to following trust funds thus succinctly: "Complainant can recover on the ground of a trust, from the receiver of the Fidelity Bank which has failed, such portion only of the proceeds of its paper sent to the bank, as it shows has passed into the receiver's hands, either in its original or some substituted form. The complainant claimed a trust should be established in its favor, against all the assets of the Fidelity Bank in possession of the defendant, without imposing upon it the duty of tracing its funds into the receiver's hands, because such funds, whether actually received by the defendant as receiver or not, have gone to

[18] Cont. Bk. v. Weems (1890), 6 S. W. Rep. 802; 69 Tex. 489; Taylor, J. J., also Bower v. Evans, 36 N. W. Rep. (Wis. 1888) 629, Cassoday and Taylor dissenting. These cases are all overruled; see note 37.

[19] Ills. Trust Bk. v. First Nat. Bk. (1883) 15 Fed. Rep. 858; see note 36.

[20] McClure v. Board of County Commissioners (1893), 34 Pac. Rep. 763 (Col.)

[21] Com. Nat. Bk. v. Armstrong (1889), 39 Fed. Rep. 684.

swell the estate or assets of said Fidelity National bank. Some cases are cited which seem to support this position, but they are not sound in principle, nor in harmony with the decided weight of authority." The Iowa Supreme Court,[22] has modified the rigor of the case of Ind. Dist. of Boyer v. King, 45 N. W. Rep. 908 (80 Iowa, 489) the same judge writing both opinions. In the older case the court sustained a blind preference lien; in the latter case it says, "but it should be shown presumptively, at least, that the estate in his hands has been augumented by the trust fund. The equities of plaintiff as against property to which its money contributed nothing, directly or indirectly, are no greater than those of the general creditor." Further: "If the money deposited had been used to purchase any of the real estate described, to improve it, to remove incumbrances therefrom, or to permit other funds to be used for such purposes, plaintiff would have a claim against the property which was used; but nothing of that kind was done. We conclude that as to the tracts of real estate specified the rights of plaintiff are not superior to those of the general creditors." Alabama is in line with the States requiring identification and tracing of trust funds.[23] A bank induced collections by fraudulent representations of solvency, and plaintiff prayed for a prior lien on assets in the receiver's hands. The court say: "We will concede that, so far as the right of the complainants to fasten a preferred lien in the nature of a trust on the assets of the bank, depends upon the fraud of the bank and its officials, their cases are made out on the facts we have stated; and if they had further shown that the identical money, which was deposited by a collection for them respectively had come into the hands of the receiver and was held by him as specie at the time the bank failed, or that their funds had been mingled with the funds of the bank which came to the receiver's hands and constituted in part the gross sum held by him, or that their identical money had been invested by the bank in tangible property, which came to the hands of the receiver and was held by him, then they would have been entitled to the relief they seek but just here, is where the case fails." * * * "Indeed, only about $110.-00 in money was turned over to the receiver at all, an amount about equal to the claim of Handcock Brothers, and about one-seventh of the claim of the brewing company, and this insignificant sum is in nowise identified as the money collected for the former, or as a part of the money deposited by the latter. There is, in short, an utter failure to identify plaintiff's money in the hands of the receiver, or to trace the money into property of the bank, which came into his possession. On these facts, no trust can be declared upon any money or property of the bank in the hands of the receiver in favor of the complainants, and they are not entitled to any preference over other creditors of the bank."

The rule in New York,[24] is that misapplied trust funds are not entitled to a preference of payment out of the assets in the hands of the assignee over the general creditors, unless it is shown that the trust property specificially belonging to the trust is included in the assets, either in its original or in some traceable form. In this case the court say that all creditors of an insolvent may be supposed to have contributed to the assets which constitutes the residuum of his estate; and where, previous to his assignment, the insolvent has paid a number of his creditors out of certain trust funds in his possession, that fact does not entitle the *cestui que trust* to a preference in the distribution of the assets except to the extent in which the assets include the identified trust funds. "The trust fund," says the court, "with the single exception mentioned—$30—was misappropriated by White (the insolvent banker) to the payment of his private debts prior to the assignment. It cannot be traced into the property in the hands of the assignee, for the plain reason that it is shown to have gone to the creditors of White in satisfaction of their debts." The court then proceeded to condemn the proposition that in the application of the trust fund to the payment of White's creditors the estate was benefited *pro tanto*, which otherwise would be a charge upon it, etc., as being "quite too vague an equity for judicial

[22] Dist. Eureka v. Farmers' Bk. (1893), 55 N. W. Rep. 342.

[23] St. Louis Brewing Ass'n v. Austin (1893), 13 South. Rep. 908.

[24] Cavin v. Gleason (1887), 105 N. Y. 256, 11 N. E. Rep. 504; also Slater v. Oriental Mills (Rhode Island 1873), 27 Atl. Rep. 445.

cognizance, and we find no case justifying relief upon such circumstances."

Michigan,[25] likewise holds it to be necessary to substantially identify misapplied trust funds in the hands of the person whom it is sought to charge. Speaking of the claim of plaintiff Neely, that it is immaterial whether the identical money misapplied by the trustee Ward, was given to defendant Rood, because Ward could not transfer any money to Rood until the money he (Ward), held in trust for others was provided for and set-off, the court, says: "The infirmity of this position is that it assumes that Rood received the $468.38 which Neely placed in Ward's hands to pay his back taxes," and then proceeds to show "that when property, held upon any trust, to keep, to use, or invest in a particular way, is misapplied by the trustees, and converted into different property, or is sold and the proceeds are thus invested, the property can be followed whereever it can be traced through its transformations, and will be subject when found in its new form, to the rights of the original owner or *cestui que trust.*" In a California federal case,[27] the county treasurer deposited county moneys in the bank and received certificates of deposit marked "special." The court held that the title to the moneys did not pass, although there was no agreement that the identical bills should be returned, and they were mixed with the bank's general funds. A California statute had made it illegal for a county treasurer to deposit money in a bank. The case being up on demurrer, the petition alleged that enough money came into the receiver's hands to pay the amount of the county funds so deposited. Demurrer overruled. The case of Central Nat. Bk. v. Conn. Mut. Life Ins. Co.,[27] which is so frequently cited, simply held that where one mixes trust funds with his own in a bank, the *cestui que trust* shall have a lien on the entire mass to the amount due it, and that the bank cannot charge up the private debts of the depositor to such trust fund as against the *cestui que trust*, where the bank has knowledge of the facts. A firm anticipated the payment of their notes due to the bank and gave checks on their deposited account therefor.[28] The checks were marked paid and the bank books showed that the notes were paid, and the full amount of $7,894.25 was deducted from the deposits. In fact, the notes had been previously sold by the bank which put the avails in their funds, all of which was unknown to the firm who supposed the bank owned the notes. The receiver got less than $8,000 in money from the insolvent bank, how much less does not appear. Payment by the receiver was decreed. "The transaction in question," says the court, "was not between the bank and Sartwell, Hough & Ford in their relation of debtor and creditor, nor in their relation of bank and depositor. The object of the latter was to provide a fund for the payment of specific notes, and the engagement of the former was to apply that fund to such payment. Thus a trust was created, the violation of which constituted a fraud by which the bank could not profit, and to the benefit of which the receiver is not entitled." How far the court was influenced by the fact of their being about money enough in the receiver's hands to pay does not appear.

There is a Tennessee case,[29] in the line of those that hold trust property may be followed where it can be traced and identified. T. and E. F. Brocchus, placed $2,500 in national currency in the hands of a commission firm for safe keeping temporarily. The firm deposited the money in their bank account, instead of observing the trust. One of the partners died shortly afterward, and the surviving partner drew the balance from the bank belonging to the firm, amounting to $4,216, and including the $2,500 trust money wrongfully deposited. The entire amount drawn passed to the hands of the receiver of the assets of the firm. The court held that the trust fund was clearly traced and there was sufficient money in the hands of the receiver to pay it—which was another means of identification and tracing—and decreed that the Brocchus should be first paid." One of the latest cases on the subject is one in Wyoming.[30] A national bank

[25] Neely v. Rood (1884), 19 N. W. Rep. 920; citing Cook v. Tullis, 18 Wall. 341; *In re* Janeway, 4 N. B. R. 100; Robert Hosie case, 7 N. B. R. 601; Bank of Commerce v. Russell, 2 Dill. 215.

[26] San Diego Co. v. Cal. Nat. Bk. (1892), 52 Fed. Rep. 59.

[27] 104 U. S. 54 (1881).

[28] People v. City Bk. of Rochester (1884), 96 N. Y. 32.

[29] Brocchus v. Morgan, 5 Cent. L. J., 53 Tenn. Sup. Ct. Sep. Term, 1875. This case seems to be omitted from the Jere Baxter reports.

[30] Foster v. Rincker, 35 Pac. Rep. (1894) 470.

collected a note for R, the plaintiff, by accepting a draft on another party for the amount, which it forwarded to its correspondent for collection, and at the same time sent plaintiff a draft on the same correspondent as a remittance of the proceeds of his note. The correspondent received the money on the draft sent it for collection, but before plaintiff's draft was paid the correspondent remitting bank failed. Held that the bank was only the agent for plaintiff, and that the money derived from his note was a trust fund, which did not become a part of the bank's assets. At the time the bank failed, it had on deposit with its correspondent a sum largely in excess of the amount of the draft, and this ($8,727.40), including the amount of $1,624 collected on plaintiff's note, was turned over to the receiver. "It may be observed, at the outset," said the court, "that it would be hard to conceive of a case in which the proceeds of a collection could be more completely and thoroughly traced into the hands of the receiver." The court approves the doctrine that trust funds may be followed so long as they can be identified, and that, "in this case there is no kind of difficulty whatever about the identification of the fund." In a Michigan case,[31] the decision itself does not furnish much light, but in reviewing the right to follow trust funds, it distinctly holds that there must be a tracing or identification, and approves all the cases that have so decided, saying: "In all these cases it is held that the fund must be clearly traced into the hands of the person sought to be charged, and that if the trust property does not remain, but has been made way with by the trustee, the *cestuis que trustent* have no longer any specific remedy against any part of his estate in his insolvency, but they must come in *pari passee* with the other creditors, and prove against the trustee's estate for the amount due them. This rule has been as steadily adhered to by the courts both of this country and of England as any rule which has ever been adopted for the protection of general creditors of a bankrupt or an insolvent." Judge Seymour,[32] made a timely distinction between the old doctrine of following trust funds and the "modern doctrine of equity," especially as followed by the cases cited above in favor of a blind lien on the assets. He says: "I look upon these cases as introducing a new principle into an old and well-known doctrine of equity, which, with the greatest deference to the courts deciding them, I do not feel at liberty to follow in advance of any adjudication by the Supreme Court." The judge then proceeded to review some of the cases awarding blind liens and showed their inconsistency. He held that if the mingling of funds was a breach of trust, it was a conversion, and plaintiff became a simple contract creditor with no preference at law. Where a merchant,[33] by false and fraudulent representations of his financial condition, procures the loan of money to be used in his business, and invests such loan in the purchase of goods which are mixed with others so as to be incapable of identification, a court of equity will not hold the borrower to be a trustee of the lender. The relation of the parties in such a case is simply that of debtor and creditor. In other words, where trust funds cannot be traced or identified, the *cestui* is relegated to the ranks of the general creditors. The court refused to decree priority over the general creditors, although it was conceded that the funds fraudulently borrowed were used to purchase goods that were then mixed with the general stock. Judge Wilkin distinctly refused to consider the blind lien cases, and cited Judge Seymour, in 38 Fed. 172, in support of the proposition that those cases are reconcilable with the rule he laid down. Another Illinois case,[34] supports Union Nat. Bk. v. Goetz, *supra*. It is said that where money delivered to a bank, though for some special purpose, as for instance investment in a mortgage security, has been mingled with the funds of the bank, there is no reason why the depositor should be preferred above any other creditor. Though the money was deposited by a trustee, yet because it can no longer be identified as a distinct fund and is so mixed up with other funds that it cannot be separated, the beneficial owner can no longer reach it. He occupies the position of a general creditor of the estate, and cannot follow the funds into the hands of an assignee for

[31] Sherwood v. Milford State Bk. (1892), 53 N. W. Rep. 923.

[32] Phila. Nat. Bk. v. Dowd (1889), 38 Fed. Rep. 172.

[33] Union Nat. Bk. v. Goetz (1891), 138 Ills., 32 Am. St. Rep. 119; see note to this case for list of authorities supporting text.

[34] Wetherbell v. O'Brien (1892), 140 Ills. 146, 33 Am. St. Rep. 221.

the benefit of creditors. To the same effect is the case of Mutual Acc. Ass'n v. Jacobs.[35] The Nebraska Supreme Court,[36] follows the rule that where a customer deposited money in a bank which the owners knew was insolvent, and which soon closed, "he may follow his money while he can trace and distinguish it, or the proceeds thereof, but not after it has passed into the hands of the assignee mingled with the other funds of the bank." Further said in Anheuser-Busch Assn. v. Est. of F. & M. Bk., 53 N. W. Rep. 1037, same court, 1893, that in the foregoing case, the deposit created the relation of debtor and creditor, and preference could not be made.

But the latest and most interesting, if not sensational case of all in the recent history of the modern doctrine of equity is that of Nonotuck Silk Co. v. Flanders,[37] by the Supreme Court of Wisconsin. This court overrules its own famous case of McLeod v. Evans, *supra*, which, since 1886, has been followed as a leading case in the United States. It must be remembered that this decision and all that followed it in that court were dissented from very vigorously by Justices Cassoday and Taylor. The opinion in the late case was written by Judge Cassoday, and only one judge—Orton, dissents. Judge Cassoday reviews the blind lien cases, and demonstrates their error in granting preferences where the funds are not traced into the estate. Says he: "We must hold that the plaintiff has no legal right so a preference over Probert's other creditors in the distribution of his estate in the hands of the defendant as assignee, and into which no part of the plaintiff's money has been traced." He concludes: "This is not a mere question of practice, nor the construction of a local statute long acquiesced in, but is a question of general equity jurisprudence; and it is very important to the people of the State that this court should, at least on such questions, adhere to the principles of the common law so well established as to become elementary. It is especially essential that the State and federal courts, on such questions, should be in harmony. In so far as McLeod v. Evans, 66 Wis. 401, 28 N. W. Rep. 173, 214; Francis v. Evans, 69 Wis. 115, 33 N. W. Rep. 93; and Bowers v. Evans, 71 Wis. 133, 36 N. W. Rep. 629, are in conflict with the rules above indicated, they must be regarded as overruled."

JOHN C. BAIRD.

[35] 141 Ills. 261 (1892), 33 Am. St. Rep. 302.

[36] Wilson v. Coburn, Neb. (1892), 53 N. W. Rep. 466.

[37] Nonotuck Silk Co. v. Flanders, 58 N. W. Rep. 383, decided March 16, 1894.

EXECUTION OF WILL — POSITION OF SIGNATURE.

BAKER V. BAKER.

Supreme Court of Ohio, March 20, 1894.

Where a testator, in what purports to be his last will and testament, appoints his sister-in-law executrix thereof, and before he signs the instrument writes thereon, after the attestation clause, the words, "My sister-in-law is not required to give bond when probated," and thereafter, in the presence of the subscribing witnesses, signs the instrument above those words, it will be a signing by the testator at the end thereof, as required by section 5916 of the Revised Statutes.

DICKMAN, C. J., (after stating the facts). Upon exception to a portion of the charge of the court as given to the jury, and the refusal of the court to give certain instructions to the jury as requested, the question arises, was the last will and testament of Elias T. Baker executed in accordance with statutory requirement? It is provided by section 5916 of the Revised Statutes of Ohio that "every last will and testament, except nuncupative wills, shall be in writing, and signed at the end thereof by the party making the same, or by some other person in his presence and by express directions." A similar requirement that the signature of the testator should be at the end of the will is found in the statutes of several other American States. Under the English statute of frauds, the testator's signature might be made in any part of the will. But the statute 1 Vict. ch. 26, as amended, introduced the condition that the signature of the testator must be somewhere near the end of the will, and so as not to be immediately over or preceding any of the dispositive parts of the instrument; and further provided that no signature should be operative to give effect to any disposition or direction which might be underneath or following it. It is the obvious and generally recognized object of the legislature, requiring a testamentary paper to be signed at the foot or end thereof, to prevent the possibility of fraudulent interpolation between the will and the signature of the testator after execution. In Turner v. Scott, 51 Pa. St. 126, it is said that the essence of the definition of a will is that it is a disposition of property to take effect after death. A law, therefore, that requires the testator to sign his last will and testament at the end thereof, would preclude the idea of making a valid testamentary disposition of property below the executing signatures, without the formality of an additional signing by the testator, and a proper attestation thereof. While,

however, the dispositive part of a testamentary instrument should be above or precede the signature of the testator, words or clauses written before the will is executed, and below the place where the testator and witnesses signed, may be excluded from probate, and yet not invalidate the entire instrument.

It would be difficult, if not impossible, to lay down a general rule which would embrace the suggestions and requests of the testator that may, before the execution of the will, be written beneath the place where the names of the testator and of the attesting witnesses are afterwards subscribed, without affecting the validity of the instrument. Each case as it arises, will present its own controlling circumstances. But such suggestions or requests so written should not be of a dispositive nature, nor contain anything likely to affect the construction of the will or the rights of the beneficiaries. In Brady v. McCrosson, 5 Redf. Sur. 431, the appointment of an executor not being deemed an essential of a will, a subsequent clause appended for the appointment of an executrix was not held to invalidate the will, and probate was allowed to all except the appointing clause. The will offered for probate was written upon a sheet of foolscap paper. All of the disposing parts were written upon a single page, by which the decedent made his wife sole devisee and legatee. In it he named no one as executor. The will was signed by the testator and two witnesses at the foot of the page. After the scrivener had drawn the will under decedent's direction, it was read over to him in the presence of the witnesses. He pronounced it to be as he wished it, whereupon it was executed and witnessed. After this had been done, and the will was completed, the deceased wished the name of his wife inserted as executrix. The scrivener drew at the top of the second page an appointment of the wife as executrix, which was signed by the decedent, but not by the witnesses. All this occurred while the witnesses were still present. It is said in the opinion of the court: "It was the ancient rule that no paper in the nature of a will would be valid as such unless it contained the appointment of an executor, but such long ceased to be the law. The statute makes provision for the appointment of an administrator with the will annexed where no executor is named in the will. I think the will properly executed as such, and that it should be admitted to probate." It was therefore held that the first page was decedent's will, and the same was admitted to probate. It was considered an operative instrument independent of the appointment of the executrix.

In the case under consideration it is not claimed that the testator, Baker, was laboring under any mistake, misapprehension, or misdirection as to where he should place his signature. The signing and attestation had reference to the same preceding parts of the instrument, and to no other. It was not a case in which the signature was attached to one disposition of the testator's property and the attestation to another. Glancy v. Glancy, 17 Ohio St. 134. The will was understandingly completed, and no obstacle stood in the way of fully carrying out all its dispositive provisions. The intimations of the testator's wish beneath the signatures, namely, "My sister-in-law is not required to give bond when probated," while it is not to be treated as part of the will, we do not regard it as of so essential a nature that the will must be avoided because it was not inserted above the testator's signature. In the light of the evidence disclosed in the record, we cannot, from those words of the testator, as was said in Hayes v. Harden, 6 Pa. St. 409, 414: "We have no reason to believe he would have wished any part of it to stand if the whole did not." The testator, by his will, had appointed his sister-in-law executrix. If nothing had been said as to bond, the omission would not have rendered the will inoperative; and a request in the body of the will that an executor be not required to give bond would be subject to the discretion of the court admitting the will to probate, which might grant letters testamentary with or without bond, as it might seem expedient; and, when granted without bond, the court might at any subsequent period, upon the application of any party interested, require bond to be given. Rev. St. § 5996. The clause dispensing with the giving of bond by the sister-in-law being inserted below the signatures of the testator and subscribing witnesses, while not admitted to probate as part of the will, is not of a character to affect the validity of the instrument. Nor do we think it was the intention of the testator that, if the Probate Court could not be permitted to exercise its discretion in relieving the executrix from the necessity of giving bond, his last will and testament should consequently be declared void. The fact that the testator expressed no wish that bond should be dispensed with before he added the words after the attestation clause would indicate that the subject was an afterthought, which had not before especially engaged his attention. In our opinion, the testator, within the meaning of the statute, signed his last will and testament at the end thereof, and the judgment of the Circuit Court should therefore be affirmed. Judgment accordingly.

NOTE.—As a general proposition it may be asserted that the signature to a will should be subscribed or written at the end, the purpose contemplated being to prevent fraudulent additions to the will. Younger v. Duffie, 94 N. Y. 535; Chaffee v. Baptist Miss. Com. 10 Paige, 85; Sisters of Charity v. Kelley, 67 N. Y. 409; 6 Lawson, Rights, Remedies & Practice, p 5146. And where the statute requires that the testator "unless prevented by the extremity of his last sickness shall" sign at the end of the will, the statute must be followed; and if the testator's signature in such case precedes a final clause appointing executors, the document is not properly executed as a testamentary paper and should not be admitted to probate. Wineland's Appeal, 118 Pa. St. 37. And the same rule obtains where the testator's signature precedes a clause ap-

pointing executors and this is followed by additional provisions subscribed by the testator. McGuire v. Kerr, 2 Bradf. 244. And see Glancy v. Glancy, 17 Ohio St. 134. But a mere memorandum under the signature does not invalidate the will. Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597. Signing at the end, however, was not a requisite under the statute of frauds, since the place of the testator's signature under that statute was not material. The fact that some further act, such as the proper acknowledgment of the instrument was necessary, seems to have been sufficient and the presumption in such case arose that a former writing of the name became, by the final act of authentication an adoption of the testator's signature. Lemayne v. Stanley, 3 Lev. 1; Allen v. Everett, 12 B. Mon. 379. So an unsigned addition to a will does not invalidate it, although the statute requires a signing at the end, if it bears neither upon the contents of the will nor on its interpretation. Wikoff's Appeal, 15 Pa. St. 281. And if a will be signed by the testator on any part of it after he cuts off a portion of the original instrument, it is still valid if it appears from the circumstances that the testator intended that the uncancelled part should remain as his will. Brown's Will, 1 B. Mon. 56. Where a will is on several sheets of paper it is held that it is not necessary that each sheet should be signed. Pearson v. Wightman, 1 Mill. Const. 336, 12 Am. Dec. 636. So an unsigned written sheet may be part of a will which is itself properly signed and executed. Martin v. Hamlin's Ex'rs, 4 Strob. 188. But it must appear that the testator's signature was intended to be regarded as such and that the instrument is complete and the paper itself must show this. Waller v. Waller, 1 Gratt. 454.

In Armstrong v. Armstrong, 29 Ala. 538, a will was written down at the dictation of the testator and in his presence, and he read over the will after it was written, and declared that it was right, and the will was properly attested, but the testator, from physical inability, was not able to sign the will, and his name did not appear otherwise than in the first clause of the will, which was as follows: "In the name of God, amen, I, James Armstrong," etc.; and the testator, at the time of declaring his inability from weakness to sign the will, stated that he desired the witness to note that it was his will. It was held that the will was sufficiently signed by the testator.

In Adams v. Field, 21 Vt. 256, a will was not subscribed, nor the testator's name written in any place except the first clause, which commenced "I, Samuel Adams," etc., and it appeared that the will was written at different times by the testator, and was in his own handwriting, and was followed by the attestation clause written in the usual form at the end, and was legally witnessed at the testator's request, and was declared by him to be his will. It was held that the word "sign" in the statute, did not necessitate a signing at the end, and that the name written at the beginning of the will was adopted as his final signature by the testator, and that it was a sufficient signing.

CORRESPONDENCE.

USURY—KNOWLEDGE BY PRINCIPAL OF AGENT'S CONTRACT.

To the Editor of the Central Law Journal:

In the case of Richards v. Purdy, Iowa Supreme Court filed May 8, 1894, p. 886, vol. 58, No. 11 N. W. Rep., the court seems to have gone farther than ever on the question of usury as to proof of principal's innocence of his agent's contract. The plaintiff in his petition says the three notes and mortgage were delivered to him, yet they hold evidence admissible to show agent kept out the $200 note as commission and that principal has not knowledge of the transaction if not proven direct. That is, parol evidence may be allowed to vary the writing to show such facts. The New York cases have not gone so far as this case.

B. MCCRARY.

USURY—BUILDING AND LOAN ASSOCIATION.

To the Editor of the Central Law Journal:

I have before me No. 24, Vol. 38 of the JOURNAL, which reports the case of The Southern Building & Loan Association against Anniston Loan & Trust Co. The opinion as printed is partially incorrect. Representing the appellant, on my motion, the following language was eliminated from the opinion, as having nothing to do with the case. "It is proper to state that the appellant company was chartered under the laws of this State, and there is no plea of usury by the mortgagor, Linsky. No intimation is made what our ruling would be on the plea of usury properly pleaded." Please investigate and make the proper correction. As I understand there is no such thing as usury in the contracts of B. & L. Associations organized under the laws of this State. See Security Loan Assn. v. Lake, 69 Ala. 456. The acts of the last session of the legislature also settled this question.

LAWRENCE COOPER.

LIABILITY OF ATTORNEY FOR EXPENSES OF PRINTING BRIEF.

To the Editor of the Central Law Journal:

In your issue of June 22d (38 C. L. J.), p. 529), you say "practitioners should make note of Trimmier v. Thomson, decided by the Supreme Court of South Carolina wherein it is held that an attorney who contracts for the printing of briefs is presumed to contract for himself, and not for his client." Williamson-Stewart Paper Co. v. Bosbyshell, 14 Mo. App. 534, and cases cited, hold the contrary view that attorneys are presumed, under these circumstances, to contract for their client; and the client was declared liable.

WILLI BROWN.

HUMORS OF THE LAW.

An instance of that legal courtesy which is a synonym of congressional courtesy, occurred in a Galesburg court room the other day. Attorney Jim McKensie and a lawyer from East Galesburg became involved in a wordy discussion, in which each questioned the other's word. The East Galesburg legal light maintained his position, claiming that he could find his authority. He turned over the pages of the statute book, when quick as flash Mac said:

"You'll find what you want on page—, section—."

The innocent attorney looked up the reference and found the law governing the running loose of jackasses.

And the court smiled.

A certain lawyer in Lincoln county was a candidate before the people for a seat in the Georgia legislature. When asked by Judge Dooley as to his prospects in the coming election, he replied that he had serious fears of his defeat, as the people in that county had a strong prejudice against voting for a lawyer. "Oh," replied the judge, "if that is all, I will help you out for you can get a certificate from me at any time that you are no lawyer."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ABUSE OF PROCESS — Interpleader — Damages.—Though the sheriff, having levied on goods claimed by a third person, promptly obtains interpleader, and the claimant voluntarily appears, and files his bond and narr., the claimant is not barred of his action against the plaintiff for abuse of process.—BIRCH v. CONROW, Penn., 28 Atl. Rep. 1009.

2. ANIMALS — Vicious Dog—Injuries.—An uncle who permits a minor nephew, living with him, to keep a known vicious dog, is liable for injuries to a child caused by it.—SNYDER v. PATTERSON, Penn., 28 Atl. Rep. 1006.

3. APPEAL — Parties — Foreclosure — Mortgage.—An appeal from a decree of foreclosure of a mortgage given by a railway company to secure its bonds, taken by one permitted to intervene in the suit only for protection of his interests as a holder of such bonds and of stock in the mortgagor company, and who neither in fact nor in law represents such mortgagor, cannot be maintained, if the mortgagor is not made a party.—DAVIS v. MERCANTILE TR. CO., U. S. S. C., 14 S. C. Rep. 693.

4. APPEAL — Supersedeas — Receivers.—A *supersedeas* granted on an appeal from an order appointing receivers, after the receivers have taken possession of the property, entitles the owner to an immediate restitution of such property.—BUCKLEY v. GEORGE, Miss., 14 South. Rep. 46

5. ASSIGNMENT FOR BENEFIT OF CREDITORS—Description of Land.—A deed of assignment of certain property, "except what are exempt" to the grantors, "or either of them, from execution by the laws," etc., is not void for uncertainty of description, though the exempt property is uncertain in amount, and the exception may be void for uncertainty.—MCCOLLOH v. PRICE, Mont., 36 Pac. Rep. 195.

6. ASSOCIATION — Masonic Lodge—Organization.—In an action by trustees of a lodge of Freemasons they cannot attack a former judgment recovered by them, and pleaded by defendant, on the ground that the former action was prosecuted by them without authority, by reason of the clerk's failure to file a certificate of plaintiff's election in the office of the recorder, as required by Rev. St. 1894, § 5019, since their acts were at least those of officers *de facto*.—ROBERTS v. HILL, Ind., 36 N. E. Rep. 843.

7. ATTACHMENT — Ground.—Attachment proceedings on the ground that defendant had disposed of his property to defraud his creditors will be dissolved as to a homestead which he conveyed to his wife in exchange for other real estate prior to the commencement thereof, when his assets were far in excess of his liabilities.—IOSCO COUNTY SAV. BANK v. BARNES, Mich., 58 N. W. Rep. 606.

8. ATTACHMENT — Liquidated Claim.—Since the amount of damages allowable for breach of a contract to sell a note at less than its face value is presumptively the difference between such face value and the agreed price, a claim based on such breach is not one for unliquidated damages, for which an attachment, by Code, art. 9, § 43, cannot issue without the giving of a bond.—DIRICKSON v. SHOWELL, Md., 28 Atl. Rep. 896.

9. ATTORNEY AND CLIENT—Power of Attorney to Indorse Notes.—An attorney to whom a note is sent for collection has no authority to indorse the same in the name of his client.—SHERRILL v. WEISIGER CLOTHING CO., N. Car., 19 S. E. Rep. 365.

10. ATTORNEY AND CLIENT—Presumption as to Authority.—The substance of our jurisprudence on the subject is that a certain degree of sanctity attaches to the act of an attorney at law, as an officer of court, which raises a legal presumption that it was authorized, and imposes on the client denying his authority the duty of supporting his denial with an oath, in order to overcome that presumption, and put the opposite party to the proof of his authority.—VICKSBURG BANK v. MCDOWELL, La., 15 South. Rep. 21.

11. BANKS—Receivers—Appointment.—In the absence of statutory authority, the appointment of a receiver for a bank on its *ex parte* application is void, and therefore can be assailed collaterally. — WHITNEY v. HANOVER NAT. BANK, Miss., 15 South. Rep. 33.

12. CARRIERS OF PASSENGERS—Street Car—Negligence.—It is not contributory negligence for a passenger on a street car to remain on the platform when there is no room inside.—MARION ST. R. CO. v. SHAFFER, Ind., 36 N. E. Rep. 861.

13. CHATTEL MORTGAGES—Record. — A chattel mortgage, which, under agreement for the debtor's benefit, is not recorded, though given for a *bona fide* debt, is fraudulent as to creditors where their liens attach before it is recorded.—HALL v. MATTHEWS, Wash., 36 Pac. Rep. 262.

14. CHATTEL MORTGAGE—What Constitutes.—A bill of sale given to pay a debt, and certain other obligations if the proceeds should be sufficient, no right in the property or proceeds being reserved, is not a chattel mortgage. — HAMMER v. O'LOUGHLIN, Wash., 36 Pac. Rep. 257.

15. CONFLICT OF LAWS — Preferences.—A New Jersey corporation, not forbidden by its charter to prefer creditors, may confess judgment by way of preference in a State where that method of preference is permitted, in spite of the New Jersey law forbidding preference by judgment confessed. — PAIRPOINT MANUF'G CO. v. PHILADELPHIA OPTICAL & WATCH CO., Penn., 28 Atl. Rep. 1003.

16. CONSTITUTIONAL LAW — Labor on Highways. — Section 4717 of the Revised Statutes, which provides for two days' labor on the public highways of this State, is not in conflict with the constitution, and is a valid law.—DENNIS v. SIMON, Ohio, 36 N. E. Rep. 832

17 CONSTITUTIONAL LAW—Occupation Tax—Municipal Power.—Municipal corporations are restricted by their charters with respect to the taxes the corporations

may impose on property or occupations.—MAYOR, ETC., OF ALEXANDRIA v. WHITE, La., 15 South. Rep. 15.

18. CONTRACT—Damages—Delay. — Plaintiffs sold to defendant the steel pillars and beams for a building; and defendant sought, in an action for the price, to recoup damages for delay in furnishing such material, which was found to be a month or six weeks, so that the building was not completed until about January 1st: Held, that injury to the building caused by rains during such delay was not an element of damage.—CARNEGIE, PHIPPS & CO. v. HOLT, Mich., 58 N. W. Rep. 623.

19. CONTRACTS—Parol Evidence. — Plaintiff swapped a horse for defendant's mare, giving defendant a note for $70, reciting that it was given for a mare "conditionally sold" to plaintiff, and to remain defendant's property till the note was paid: Held, that parol evidence was competent to show the terms of the trade.—LABBEE v. JOHNSON, Vt., 28 Atl. Rep. 986.

20. CORPORATIONS—Insolvent Corporations — Claims of Directors.—A claim by a director against the estate of an insolvent corporation will not be disallowed on the ground that the debts of the company were in excess of the capital stock, where the auditor reports that there was no evidence to show such fact other than the amount of the claims presented, some of which were contingent, and resulted from the failure of the company.—IN RE TREVOSE MODEL BRICK MANUF'G CO., Penn., 28 Atl. Rep. 1023.

21. CORPORATIONS—Contract—Validity.—A statute of British Columbia which provides that, if a foreign corporation transact business in such province without having registered, it shall incur a penalty not exceeding five dollars for every day during which business is so carried on, does not render void contracts made by it without having so registered.—EDISON GENERAL ELECTRIC CO. v. CANADIAN PAC. NAV. CO., Wash., 36 Pac. Rep. 260.

22. CORPORATION—Stockholder—Pledge.—The holder of all the stock of a corporation has no power to pledge the property of the corporation to secure his individual debt, to the prejudice of the creditors of the corporation.—STEWART v. GOULD, Wash., 36 Pac. Rep. 277.

23. CRIMINAL LAW—Assault—Removal of Public Nuisance.—On trial on indictment for assault with intent to kill it appeared that A maintained a gate across a highway leading to a beach where defendant W had a seaweed privilege, and tried to prevent defendants, who came there with the intention of forcing the gate in case of resistance, from going through on their way to the beach, whereupon defendants forced the gate causing a fight, resulting in the injuries to A, for assaulting whom defendants were indicted: Held that, although A was maintaining a public nuisance, which was a source of special injury to W, defendants were not justified in using violence to overcome his resistance.—STATE v. WHITE, R. I., 28 Atl. Rep. 968.

24. CRIMINAL LAW—Carrying Concealed Weapons.—The fact that one who carries a concealed weapon does so with the purpose of selling it does not excuse his act.—STATE v. DIXON, N. Car., 19 S. E. Rep. 364.

25. CRIMINAL LAW — Evidence of Character.—In a prosecution for selling whisky to Indians, defendant's reputation in the community of his residence, as to his being a law-abiding citizen, cannot be shown.—CHUNG SING v. UNITED STATES, Ariz., 36 Pac. Rep. 205.

26. CRIMINAL PRACTICE—Assault—Deadly Weapon.—Where an indictment charges an assault to commit murder, and avers that the assault was made with a weapon which the description shows to be deadly, an assault with a deadly weapon is charged.—WEST v. TERRITORY, Ariz., 36 Pac. Rep. 267.

27. DEEDS — Action to Set Aside.—In an action to avoid a conveyance of an equity of redemption to the mortgagee by the mortgagor, an aged woman unable to read or write, the burden is on the mortgagee to show that the conveyance was given on a contract independent of the mortgage contract, and that the mortgagor signed it voluntarily, knowing its character.—HALL v. HALL, S. Car., 19 S. E. Rep. 305.

28. DEED—Boundaries.—Where, in a description in a deed, the point of beginning and the three last corners were monuments, and, in running in regular order by courses and distances the several lines between the point of beginning and the second monument, the line from the corner next preceding such monument to such monument passed outside the monument, the true rule was to run such line to the monument, disregarding course and distance, and not to survey the lines from the point of beginning in reverse order.—NORWOOD v. CRAWFORD, N. Car., 19 S. E. Rep. 349

29. DEED — Construction.— Where the owner of a leasehold sub'eases a portion described as "bounding" on a street to the center of which such owner has title, the sublessee's title extends to the middle of the street, subject to the easement of the right of way.—GUMP v. SIBLEY, Md., 28 Atl. Rep. 977.

30. DEED—Delivery — Escrow.—When a deed placed in escrow, to be delivered when the grantee has paid certain liens on the land conveyed, is, after the grantor's death, obtained by the grantee, without payment of the liens, and by him recorded, the grantee's title is voidable by proof of the facts rebutting the presumption of delivery, but not void.—LANDON v. BROWN, Pa., 28 Atl. Rep. 921.

31. DOWER—Mortgages—Where a husband conveys land subject to his wife's dower and to certain mortgages, and she afterwards pays and takes an assignment of the mortgagees, she is not entitled to dower in the entire land, but only in the husband's equity of redemption.—BONFOEY v. BAYNE, Mich., 58 N. W. Rep. 628.

32. DRAFT—Demand of Payment.—Three persons arranged to plant an orange grove, one furnishing the money to another (who was to manage the business on a salary) on drafts drawn by him on, and accepted by, the third, who, with the first, furnished the trees; the profits, if any, to be divided equally: Held, that the payee of a draft so drawn and accepted cannot hold the drawer, without demand upon the acceptor at maturity, as the bill was, as between the parties, a debt due the firm by the acceptor.—LOS ANGELES NAT. BANK v. WALLACE, Cal., 36 Pac. Rep. 197.

33. EASEMENTS — Public Policy. — A land-owner's agreement with his neighbor to support a petition to change the route of the highway so as to cut himself off therefrom, in consideration of a private way to it through the other's lands, creates an easement, which, after more than 10 years' user, cannot be denied on the ground that the agreement was against public policy.—CORNS v. CLOUSER, Ind., 36 N. E. Rep. 849.

34. EJECTMENT—Public Lands—Duplicate Receiver's Receipt.—A duplicate receiver's receipt, issued to one making a homestead filing, does not entitle the holder to maintain ejectment though the filing was after a contest in the land office, in which he was given the right to enter, and the entry of the person in possession was canceled.—BALSZ v. LIEBENOW, Ariz., 36 Pac. Rep. 209.

35. ELECTIONS—Contest—Notice.—A service of notice under Civ. Code, § 625, is valid where a copy was left at the usual place of abode of the person to whom directed, in his absence, with a person over 15 years of age, although the latter, when it was left with him, was several hundred feet from the place. — BROADUS v. MASON, Ky., 25 S. W. Rep. 1060.

36. EMINENT DOMAIN — Location of Gas Pipe Line.—In an action by a land-owner for damages caused by the construction of a pipe line for conveying gas across his land, injuries resulting from leakage of the main are not proper elements of damage, in the absence of evidence that such leakage was consistent with a proper construction of the line, and not the result of negligence in the operation thereof. — DENNISTON v. PHILADELPHIA CO., Penn., 28 Atl. Rep. 1007.

37. EMINENT DOMAIN — Measure of Damages. — The

measure of compensation to be awarded owners of land in a proceeding to acquire the right to continue a railroad thereon is not affected by their recovery of damages in trespass for unlawfully building and operating such road thereon. — HOPSON v. LOUISVILLE, N. O. & T. RY. CO., Miss., 15 South. Rep. 37.

38. EQUITY—Rescission of Contract.—The law will not maintain a contract, the consent to which, of one of the parties, is the result of error as to the substance of the contract,—the error being caused by artifices and fraudulent representations of the other party,—or if the frauds (not his, directly) have been participated in or made effective by him.—ASHLEY v. SCHMALINSKI, La., 15 South. Rep. 1.

39. EVIDENCE—Declarations of Husband. — Declarations of a husband, made in the absence of his wife, are not admissible to affect the title of his wife to personal property. — LEEDOM v. LEEDOM, Penn., 28 Atl. Rep. 1024.

40. FEDERAL COURT—Appeal—Jurisdictional Amount. —On a verdict for plaintiff for $5,000, a judgment for that amount was entered, but, on defendant's motion *ex parte*, was amended to include interest on the verdict: Held, that this addition of an amount not claimed by plaintiff did not make the matter in dispute exceed $5,000, so as to bring the case within the jurisdiction of the Supreme Court.—NORTHERN PAC. R. CO. v. BOOTH, U. S. S. C., 14 S. C. Rep. 693.

41. GUARDIAN AND WARD—Accounting—Parties.—The voluntary grantees of a surety on a guardian's bond are proper parties to a suit in equity by the former wards against the personal representative of such guardian and the sureties on his bond for an accounting, and to hold the sureties liable for the result of such accounting.—PATTY v. WILLIAMS, Miss., 15 South. Rep. 43.

42. GUARDIAN AND WARD — Investments in Realty.— Where a guardian's loan of his wards' money was disallowed and charged to him, and was afterwards paid him by conveyance of realty, on which he received the rents and paid the taxes and insurance, it being certain what part of the purchase price was the wards' money and what the guardian's the ward may elect to charge their money with interest on the lot, or take an interest therein proportionate to the amount of their money that went into it, and to that end are entitled to accounts stated both ways.—FANT v. DUNBAR, Miss., 15 South. Rep. 30.

43. GUARANTY—Consideration.—A guarantee of notes in consideration of the release by the payee of all right of lien to which he was entitled on a building and machinery is not without consideration because such release was executed 15 days before the contract of guaranty was made.—KOENIGSBERG v. LENNIG, Penn., 28 Atl. Rep. 1016.

44. HIGHWAYS OVER DEPOT GROUNDS.—Under Howell's Statutes (chapter 29, §§ 1298, 1322), giving highway commissioners power to lay out highways across rail roads, such commissioners have power to lay out highways across village depot grounds, except where the concurrent use of such premises will be impossible, or attended by inconvenience to the railroad amounting to inability to so use them, and the burden is upon the railroad to show such incompatibility in the two uses.—BATTLE CREEK & S. RY. CO. v. TIFFANY, Mich., 58 N. W. Rep. 617.

45. HUSBAND AND WIFE — Community Property. — Where the community property of the husband and wife, both being dead, is administered by the administrator of the husband in paying the community debts, the administration and sale thereof by the administrator vests the title to the property in the purchaser as against the heirs of the wife. — HALBERT v. CARROLL, Tex., 25 S. W. Rep. 1102.

46. HUSBAND AND WIFE—Occupation by Husband as Home.—Where a husband buys property as a home for himself and family, and conveys it to his wife, and she afterwards goes into another State, for the professed purpose of visiting her father, and there obtains a divorce, he continuing to occupy the premises as his home, she cannot, in an action to recover possession, recover rents for the period prior to her divorce.—EDWARDS v. EDWARDS, Miss., 15 South. Rep. 42.

47. INSOLVENCY—Preferential Mortgage. — Under Act 1890, ch. 364, prohibiting preferences by merchants, etc., insolvent or contemplating insolvency, saving liens for money *bona fide* loaned and paid at the time, it is not enough to avoid a mortgage that the mortgagor was insolvent, if the mortgagee acted in good faith, and presently paid him the whole sum secured. —HINKLEMAN v. FEY, Md., 28 Atl. Rep. 886.

48. INSURANCE—Proof of Loss. — Where an insurance company denies the making of the policy, and all liability thereunder, and absolutely refuses to pay the loss, the right of action of the insured immediately accrues, although the policy contains a clause giving the company an option either to pay the loss or replace the property damaged within a specified time.—WESTERN HOME INS. CO. v. RICHARDSON, Neb., 58 N. W. Rep. 597.

49. INTOXICATING LIQUORS — Ordinance.—Where an ordinance requires every person or corporation engaged in the brewing or distilling business within the city, and all depots or agencies of such concerns, and all dealers in malt liquors, to pay a license fee of $1,000, a provision therein that it "shall not apply to any resident engaged in the wholesale business of bottling and vending bottled beer" is void (1), as discriminating in favor of residents, as against non residents; and (2) as discriminating in favor of residents who bottle and vend beer, as against residents who vend beer in other ways.—CITY OF INDIANAPOLIS v. BIELER, Ind., 36 N. E. Rep. 857.

50. JUDGMENT—Revivor—Limitation.—Where an officer executing a writ of execution founded on a judgment or order causes a homestead to be set off to the debtor, on such debtor's application, the assignment of the homestead will not prevent the judgment from becoming dormant, upon a failure of the judgment creditor to comply with the provisions of section 5380 of the Revised Statutes.—WUEST v. JAMES, Ohio, 36 N. E. Rep. 832.

51. LANDLORD AND TENANT—Oil and Gas Lease.—An oil lease "for the purpose of drilling and operating for oil and gas," for 2 years, "and as much longer as oil or gas is found in paying quantities, or the rental paid thereon," provided that the lessee should commence a well within 30 days, and complete it in 90 days, or, in default, pay an annual rental of $60 until such well should be completed; that a failure to complete it or pay such rental within 10 days after the time specified should render the lease void; and that it should be optional with the lessee at any time either to drill the well, to pay the rental, or forfeit the lease: Held, that the lessee, who did no drilling for oil or gas during the two years, could not hold the premises after two years by paying the $60 annual rental.—WESTERN PENNSYLVANIA GAS CO. v. GEORGE, Penn., 28 Atl. Rep. 1004.

52. LANDLORD AND TENANT — Oil Lease—Devise of Land.—Where, during the term of an oil lease of three contiguous farms embracing 600 acres, the lessor dies and devises the farms to different persons, the devisees are entitled to share alike in the royalty reserved, though the wells are all on one farm, as through such wells the oil may be drawn from all the farms.—WETTENGEL v. GORMLEY, Penn., 28 Atl. Rep. 934.

53. LIFE INSURANCE — Insurable Interest—When Exists.—One has an insurable interest in the life of another, who, out of friendship, and without any bonds of kinship, has assumed the position of father to him. —CARPENTER v. UNITED STATES LIFE INS. CO. OF NEW YORK, Penn., 28 Atl. Rep. 943.

54. MALICIOUS PROSECUTION — Probable Cause.— Plaintiff was employed by a corporation to collect its accounts, and the company agreed to pay certain of

his debts. The company failing to pay such debts, plaintiff notified it that he had collected certain money for it, which he would turn over as soon as it paid said debts, which amounted to as much as the sum collected: Held, that these facts showed no probable cause for charging plaintiff with embezzlement.—BROOKS v. BRADFORD, Colo., 36 Pac. Rep. 303.

55. MALICIOUS PROSECUTION.—A malicious arrest of defendant in an action which plaintiff has a right to bring is a ground for malicious prosecution.—LAUZON v. CHARROUX, R. I., 28 Atl. Rep. 975.

56. MANDAMUS AGAINST CITY—Officer's Salary.—*Mandamus* is a proper remedy to enforce the payment by a municipal corporation of an official salary, the amount of which is fixed.—SPEED v. COMMON COUNCIL OF CITY OF DETROIT, Mich., 58 N. W. Rep. 638.

57. MASTER AND SERVANT — Damages.—Under Code, 1892, § 1068, making liable, in double damages, any person who "knowingly employs" a laborer under contract with another for a specified time, before the expiration of the contract, without the employer's consent, the fact that the laborer breaks the contract, and ceases to work thereunder, before he is employed by such person, does not render the latter any the less liable for damages.—ARMISTEAD v. CHATTERS, Miss., 15 South. Rep. 39.

58. MASTER AND SERVANT — Dangerous Premises.—Where plaintiff, a carpenter in defendant's car repair shop, while assisting, in obedience to the foreman's order, in pushing cars, was injured by the fall of a running board which had been improperly left in a dangerous position between the cars, and, though neither plaintiff nor the foreman knew that the board had not been removed, plaintiff might have seen it, had he looked, it was proper to direct a verdict for defendant, since plaintiff was negligent in failing to look.—DAY v. CLEVELAND, C., C. & ST. L. R. CO., Ind., 36 N. E. Rep. 854.

59. MASTER AND SERVANT — Negligence—Dangerous Machinery.—Where an ordinary day laborer, who has been employed in a starch factory for three years operating levers which put cogwheels in or out of gear, is injured in fastening to the shafting, while it was in motion, one of the cogwheels which had become loose, the employer is not liable for failure to instruct him how to adjust the machinery, and to warn him of the danger incident thereto; there being a machinist whose duty it was to make repairs, and the danger of attempting such repair while the shafting was in motion being obvious.—MCCUE v. NATIONAL STARCH MANUF'G CO., N. Y., 36 N. E. Rep. 809.

60 MECHANICS' LIEN — Covenant by Contractor.—Where a contractor covenants that no lien shall be filed, a subcontractor cannot have a lien, though the contractor is part owner of the property, if the contract is in good faith, and not to mislead and defraud; but if the contractor is the sole owner of the property, and the person with whom he contracts holds the property in her name merely as his trustee, the covenant against liens is of no effect.—BALLMAN v. HERON, Penn., 28 Atl. Rep. 914.

61. MECHANICS' LIENS—Limitations.—1 Code Wash. § 1670, which declares that an action to foreclose a mechanic's lien must be begun with eight months after the claim is filed, or, if credit be given, then within eight months from the expiration of such credit, "but no lien shall continue in force for a longer time than two years from the time the work is completed or credit given," merely means that a lien cannot be maintained where credit for more than two years is given, and not that final judgment must be obtained within two years.—PACIFIC MANUF'G CO. v. BROWN, Wash., 36 Pac. Rep. 273.

62. MORTGAGE — Foreclosure — Attorney's Fees.—While the stipulation in an act of mortgage that, in the event suit becomes necessary for its enforcement, the mortgagor is to pay attorney's fees, and only on the happening of that condition are such fees due, yet it is the duty of the mortgagee to make a timely legal tender of the principal and interest of the debt in order to prevent the institution of suit, and save himself the payment of attorney's fees.—SIMONDS v. MCMICHAEL, La., 15 South. Rep. 23.

63. MORTGAGE—Merger — Subrogation.—Where, before one joint tenant deeded his interest to the other, who then paid a mortgage against the land, he had deeded it to a trustee, without the other joint tenant's knowledge, the mortgage did not merge, and will be revived.—SHAFFER v. MCCLOSKEY, Cal., 36 Pac. Rep. 196.

64. MORTGAGES—Sale of Standing Timber.—Record of a mortgage is constructive notice to one who buys standing timber from the mortgagor.—WEBBER v. RAMSEY, Mich., 58 N. W. Rep. 625.

65. MUNICIPAL CORPORATION—Annexation—Petition.—Under Rev. St. 1894, § 3659, requiring the petition for annexation of territory contiguous to a city to set forth "the reasons for such annexation," the sufficiency of the reasons is left to the discretion of the authority passing on the petition.—CHANDLER v. COMMON COUNCIL OF CITY OF KOKOMO, Ind., 36 N. E. Rep. 847.

66. MUNICIPAL CORPORATIONS—Assessments.—Where a city ordinance declares that the cost of improving any street, "shall be assessed upon the lots and lands fronting thereon," and a certain street is improved by lowering its grade, and the gravel removed therefrom is spread over another part of the street, which has been previously graded, and which was not mentioned in the ordinance providing for said grading, land abutting on the part of the street on which the gravel is spread cannot be assessed therefor.—CITY OF VANCOUVER v. WINTLER, Wash., 36 Pac. Rep. 278.

67. MUNICIPAL CORPORATIONS — Assessments—Street sprinkling is not a "local improvement" within the meaning of the statute authorizing cities and villages to make such improvements by special assessment.—CITY v. CHICAGO v. BLAIR, Ill., 36 N. E. Rep. 829.

68. MUNICIPAL CORPORATIONS — Changing Grade of Street—Damages.—Under Const. art. 16, § 8, providing compensation for property taken, injured, or destroyed for public use, the property owner may recover for damages caused by changing the grade of a side street, though his property does not abut upon it.—MELLOR v. CITY OF PHILADELPHIA, Pa., 28 Atl. Rep. 992.

69. MUNICIPAL CORPORATIONS—Gas Companies—Pipes—Damages.—Sidewalks are a part of the street, in so far as concerns the abutting owners' right to damages for the laying of pipes thereunder.—MCDEVITT v. PEOPLE'S NATURAL GAS CO., Pa., 28 Atl. Rep. 948.

70. MUNICIPAL CORPORATIONS— Improvement—Abutting Owners.—In the control and improvement of its public streets a municipal corporation, in the absence of any lawful restriction or regulation to the contrary, has the same rights and powers as a private owner has over his own land, and, as to abutting owners, is subject to the same liabilities.—MUNGER v. CITY OF ST. PAUL, Minn., 58 N. W. Rep. 601.

71. MUNICIPAL CORPORATION—Ordinances—Approval by Mayor.—The charter of Astoria provides that a vacancy in an office shall be filled by appointment by the council; that the mayor shall preside at council meetings, but if he be absent or disabled the president of the council shall preside, and sign ordinances, etc., in his stead; and that no ordinance shall take effect until submitted to and approved by the mayor, except as it may fail of his action, or be passed over his veto: Held, that the president can sign an ordinance only during the temporary absence or disability of the mayor, not during a vacancy in the office.—BABBIDGE v. CITY OF ASTORIA, Oreg., 36 Pac. Rep. 291.

72. MUNICIPAL CORPORATIONS—Public Improvements—Damages.—Where one dedicates land for a street, with the same effect as if the street had been opened by legal proceedings, he cannot afterwards maintain an action for damages resulting from the grading; the

opening and grading having been done at the same time, and in conformity with a pre existing plan.—RIGHTER V. CITY OF PHILADELPHIA, Pa., 28 Atl. Rep. 1015.

73. MUNICIPAL CORPORATION—Sewer Assessment.—In an action by a contractor to enforce a sewer assessment lien, the property owner cannot ask that the city be made a party, since the joinder of a city could have no effect on any right of defense he might have.—LAKE ERIE & W. R. Co. v. BOWKER, Ind., 36 N. E. Rep. 864.

74. MUNICIPAL CORPORATION—Water-works Bonds—Injunction.—A city charter authorized the council to buy or build and conduct water-works, and to that end to issue and sell bonds to a certain amount, whereby the city should be deemed to promise to pay to bearer the sum named, with interest; to establish and collect water rates, whose proceeds should be kept as a separate fund, and only used for expenses and improvements on the works and interest on the bonds, all the surplus to go to a sinking fund to pay the principal when due: Held, that the sinking fund clause having no express provision to the contrary, the city was generally and primarily liable for the payment of such bonds, and resident taxpayers had the right to sue to enjoin their improper issue.—AVERY V. JOB, Oreg., 36 Pac. Rep. 293.

75. MUTUAL BENEFIT COMPANIES — Non payment of Dues—Suspension.—Where the constitution of a mutual benefit association provides that a member failing to pay any assessment "shall stand suspended," a member by failure to pay his assessments *ipso facto* is suspended, without any vote of the lodge.—SUPREME LODGE KNIGHTS OF HONOR V. KEENER, Tex., 25 S. W. Rep. 1085.

76. NEGLIGENCE—Fires set by Steamboats.—In an action for damages for loss by fire alleged to have been set by sparks from defendant's steamer, it was error to charge that defendant was liable if the use of ordinary care required it to equip the smokestack of its boat with a fire screen, although it was equipped so that, by closing her dampers and opening the flue cap, no sparks sufficient to set property on fire could escape.—CHEBOYGAN LUMBER CO. V. DELTA TRANSP. CO., Mich., 58 N. W. Rep. 630.

77. NEGLIGENCE—General Denial—Evidence —Under a general denial to a complaint alleging injury to plaintiff's house by the negligent blasting of defendant on his adjoining lot, defendant can show that the blasting was done by an independent contractor, for whose negligence he was not liable.—ROMER V. STRYKER, N. Y., 36 N. E. Rep. 808.

78. NEGLIGENCE — Street Cars— Crossing Teams.—When the negligence charged is the unusual speed of an electric car, the court cannot say that plaintiff, driving a pair of spirited horses to a long, heavy market wagon, having stopped to look and listen, and only seen the car coming on the further track when his horses were on the near one, was negligent in whipping them up to cross ahead of it.—DOWNEY V. PITTSBURGH, A. & M. TRACTION CO., Penn., 28 Atl. Rep. 1019.

79. NEGLIGENCE—Wires Hanging from Electric Light Pole.—Evidence that defendant electric light company had its line constructed along a street; that a guy wire from one of its poles stretched across the sidewalk, and, charged with electricity from another guy wire crossing the feed wire on a street railway company, had become detached from a tree to which it had been fastened, and was hanging to the ground; and that plaintiff's son was killed by coming in contact with it while walking along the sidewalk, — makes a *prima facie* case, and puts on defendant the burden of showing that it was not negligent.—HAYNES V. RALEIGH GAS CO., N. Car., 19 S. E. Rep. 344

80. NEGOTIABLE INSTRUMENTS — Charges on Wife's Separate Property.—When a married woman, separate in property, sells by authentic act her paraphernal property, although the sale is a disguised mortgage for the benefit of the husband, yet, if the notes given for the purchase price fall into the hands of innocent third parties, the vendor's lien and special mortgage securing the notes will be enforced.—LESTER V. CONNELY, La., 15 South. Rep. 4.

81. NEGOTIABLE INSTRUMENT—Promissory Notes—Indorsement.—A third party, who indorses a note before delivery, is an original promisor, and, if the note be joint and several, the payee may sue him without joining the formal maker.—WADE V. CREIGHTON, Oreg., 36 Pac. Rep. 289.

82. NEGOTIABLE INSTRUMENT—Rescission.— Before a note can be rescinded for fraud, the maker must account for the benefits he has received in the transaction.—TEMPLETON V. GREEN, Tex., 25 S. W. Rep. 1073.

83. NEGOTIABLE NOTE — Bona Fide Purchaser. — Where plaintiff rediscounted for a bank, along with other paper, a note of defendants, against which they claimed an equity, placing the proceeds to its credit, and, before notice of the equity, paid on the checks of the bank, half the amount of such proceeds, plaintiff was a purchaser for value, though, between the rediscount and the notice, plaintiff had credited other items to the bank, so that on the day of notice it owed the bank more than the proceeds of the rediscount.—UNITED STATES NAT. BANK OF NEW YORK V. MCNAIR, N. Car., 19 S. E. Rep. 361.

84. NEW TRIAL—Excessive Damages.— A motion for a new trial on the ground of excessive damages is addressed to the discretion of the trial court, and its exercise thereof will not be disturbed unless the record shows affirmatively that the discretion was improperly exercised.—KOHLER V. FAIRHAVEN & N. W. RY. CO., Wash., 36 Pac. Rep. 253.

85. PARENT AND CHILD—Service—Implied Promise to Pay.—Where a father, who has need of help on his farm, induces a son, after he has attained majority, to work thereon, and the son remained for years, rendering continuous and valuable services, a promise to pay the reasonable value thereof may be implied.—HARDY V. HARDY, Md., 28 Atl. Rep. 887.

86. PARTITION—Estoppel.—Where land of estate was sold on petition of the administrator, and the heirs thereafter accepted their *pro rata* shares of the price, knowing what their interest in the land was, and that the moneys accepted by them were the proceeds of the sale of their interest therein, they are not entitled to recover their interest in the land from the purchaser, without returning the price, though the sale was void.—WILMORE V. STETLER, Ind., 36 N. E. Rep. 856.

87. PARTNERSHIP.—B, who owned an oil lease, sold interests therein to defendants, B agreeing to furnish necessary appliances, and to drill a well, and defendants agreeing to pay their proportion of the cost of drilling: Held, that defendants and B were merely tenants in common as to the lease, and defendants were not liable as B's partners on his unauthorized purchase of machinery to carry on the drilling.—TAYLOR V. FRIED, Penn., 28 Atl. Rep. 993.

88. PARTNERSHIP—Dissolution—Receiver.—The right given by Pub. St. ch. 237, § 19, to have costs of an attachment preferred, where under section 12, it is dissolved by an assignment by the debtor for the benefit of creditors, is not affected by the fact that prior to the attachment a suit was instituted among the partners of the debtor firm for a dissolution, accounting, and receiver, in which a decree was rendered merely for the appointment of a receiver, subsequent to which the assignment was made, where there is no decree for an account of the partnership property and debts.—BANK OF AMERICAN LOAN & TRUST CO. V. BURDICK, R. I., 28 Atl. Rep. 967.

89. PARTNERSHIP — Landlord and Tenant.—A leased property to B, the latter covenanting to pay as rent therefor one-half of the profits above all expenses, including advertising, B's necessary personal expenses, while engaged in the work, and also the board of B's wife: Held, that A and B were lessor and lessee, and

not partners.—Z. C. MILES CO. OF SEATTLE v. GORDON, Wash., 36 Pac. Rep. 265.

90. PLEADING.—In an action on a note which, except for certain payments, would be barred by the statute of limitations, plaintiff, where he declares simply on a promise contained in the note, may amend by declaring on the new promise arising by operation of law from the payments.—JACOBS v. GILREATH, S. Car., 19 S. E. Rep. 308.

91. PLEDGE—Contract—Authority to Sell.—A maker of a note pledged certain shares of stock and a life insurance policy, and agreed to maintain on demand 10 per cent. margin collateral security, "and on the non performance of this promise, or any part of it, I authorize S, agent, to sell the collateral," etc.: Held, that the authority to sell related to the failure to pay the note as well as the failure to maintain such margin, and that a sale for non-payment was not a conversion of the collaterals.—MANNING v. SHRIVER, Md., 28 Atl. Rep. 899.

92. PRESUMPTION OF PAYMENT.—After the lapse of 20 years from testator's death, a presumption arises that legacies bequeathed by him have been paid, though during that period there was an interval of several years between the death of the legatees and the appointment of their administrator. — COX v. BROWER, N. Car., 19 S. E. Rep. 365.

93. PRINCIPAL AND AGENT—Ratification.—The ratification of the act of an agent cannot be divided, and applied to one part of the act and excluded from the other. It is entire or nothing.—E. O. STANARD MILLING CO. v. FLOWER, La., 15 South. Rep. 16.

94. PROCESS—Service outside State.—Under Act 1891, ch. 120, authorizing service of summons on a non-resident outside the State, "in lieu of publication in a newspaper," such service will give jurisdiction only where publication would, and will not in an action for debt, where there is no attachment. — LONG v. HOME INS. CO. OF NEW ORLEANS, N. Car., 19 S. E. Rep. 347.

95. PUBLIC LANDS—Mexican Grant — Recognition.—A territorial court cannot recognize an unconfirmed Mexican grant, as to which no proceedings are pending congress, the surveyor general, nor the private land before court, as against pre-emption and homestead claims filed under the United States laws.—AINSA v. NEW MEXICO & A. R. CO., Ariz., 36 Pac. Rep. 213.

96. RAILROAD COMPANY—Contributory Negligence.—Where a person walks along a four-track railroad till he comes to a street crossing, and then steps in front of a moving engine, which gives no signals, the question of his contributory negligence will not be affected by the fact that the gates at the sides of the crossing are up, and the watchman gives no signal, as the gates and watchman are only to guard against coming onto the crossing along the street.—MATTHEWS v. PHILADELPHIA & R. R. CO., Penn., 28 Atl. Rep. 936.

97. RAILROAD COMPANY—Negligence—Coupling Cars.—Where a rule of a railroad company forbids a brakeman to go between the cars in making a coupling, the facts that the conductor in charge tells a brakeman to hurry up, and that the conductor has previously seen him go between the cars in making couplings, do not amount to an express order to go between the cars, so as to relieve the brakeman from an imputation of negligence in so doing.—MASON v. RICHMOND & D. R. CO., N. Car., 19 S. E. Rep. 362.

98. RAPE.—On trial for rape, a charge that defendant was guilty of an aggravated assault if he assaulted the prosecutrix, not with intent to commit rape upon her, but with intent to have sexual intercourse, with her consent, is misleading.—ISAACS v. STATE, Tex., 25 S. W. Rep. 1073.

99. SALE — Contract—Construction.—A contract for the sale of foreign iron ore, to be delivered in Pennsylvania, provided that the price was based on a freight rate of 11 shillings per ton, "the buyers to receive or pay any differences; such differences to be settled by their paying or receiving actual differences between 11 shillings and the rate of freight paid on delivery to them:" Held, that the buyers were not entitled to the dispatch money provided for in the charter party, and received by the sellers.—NAYLOR v. BETHLEHEM IRON CO., Penn., 28 Atl. Rep. 1811.

100. SCHOOL DISTRICT — Contract by President of Board.—A school district is not bound by a provision in a written contract inserted by the president of its board of directors without the authority of the board.—ROLAND v. READING SCHOOL DIST., Penn., 28 Atl. Rep. 995.

101. SCHOOL LANDS—Forfeiture of Contract.—Before a contract of purchase of school lands entered into with the State can be declared forfeited, because of a default in the payment of annual interest, notice to the delinquent purchaser of such proposed cancellation must first be given by the commissioner of public lands and buildings.—STATE v. CLARK, Neb., 58 N. W. Rep. 585.

102. STATE OFFICERS—Removal by Governor.—Even if a constitutional office were vested property, a removal for cause, after investigation, by the governor, by lawful administrative process, would be due process of law.—ATTORNEY GENERAL v. JOCHIM, Mich., 58 N. W. Rep. 611.

103. TAXATION—Privilege Tax.—A plantation store, kept by the planter, to furnish his tenants with necessary supplies, as required by his contracts with them, the goods being sold at the usual credit prices, for a profit, and a staff of clerks employed, is a "store" subject to privilege tax.—ALCORN v. STATE, Miss., 15 South. Rep. 37.

104. TAXATION — Exemptions — Public Charity.—A "Masonic Home," which, by means of voluntary contributions, without charge to the beneficiary, profit to itself, or pay to its officers, houses and maintains indigent, afflicted, and aged persons, unable to support themselves, is not an "institution of purely public charity," exempt from taxation by Const. 1874, art. 9, § 1, since its benefits are limited to Freemasons.—CITY OF PHILADELPHIA v. MASONIC HOME OF PENNSYLVANIA, Penn., 28 Atl. Rep. 954.

105. TAXATION — Imported Goods. — Imported goods, in the importer's possession, are not part of the property in the State subject to taxation.—STATE v. BOARD OF ASSESSORS, La., 15 South. Rep. 10.

106. TAXATION—Taxes—How Collected. — Taxes are not debts in the ordinary acceptance of the term, and generally an action at law will not lie for their collection. While the right to an action may be implied from a failure of the legislature to provide any means for enforcing the payment of taxes, yet, where the legislature has provided a means of enforcing payment, that remedy is exclusive.—RICHARDS v. COMMISSIONERS OF CLAY COUNTY, Neb., 58 N. W. Rep. 594.

107. TAX DEED. — The complaint in an action to set aside a tax deed as a cloud alleged that the assessment made on the three lots in controversy for taxes of 1888, was invalid, because the lots were assessed in gross; that the taxes were not paid, and the three lots, with eight others in different blocks, were sold to defendant in gross for the total taxes of 1888; and that the gross assessment and gross sale were void: Held, that the complaint was demurrable for failure to allege injustice or injury to plaintiff from the invalid assessment, or payment or offer to pay the taxes properly chargeable.—CASEY v. WRIGHT, Mont., 36 Pac. Rep. 191.

108. TAX SALE—Right to Redeem. — Under Rev. St 1881, § 6466, providing that any person having an interest in land sold for taxes may redeem, the holder of a sheriff's certificate of sale on foreclosure of mortgage, pending the period of redemption from such sale, may redeem the land from a tax sale, and enforce a lien for the amount so paid as against a judgment creditor who redeems from the foreclosure sale.— GABLE v. SEIBEN, Ind., 36 N. E. Rep. 844.

109. TELEGRAPH COMPANY — Nominal Damages.— A telegraph company failed to deliver the following

telegram, sent to the comptroller of the currency "Would you accept receivership First National Bank, Wilmington? Compensation $200 per month, subject to future modification:" Held, that where the pleadings raised no question as to exemplary damages, plaintiff could recover only nominal damages, since, if he had received the message, and had sent an affirmative reply, the government would have been under no obligation to confer the office on plaintiff.—WALSER v. WESTERN UNION TEL. CO., N. Car., 19 S. E. Rep. 366.

110. TENDER—Pledge— Extinguishment.—A pledge is extinguished by a tender of the amount due before a valid sale of the pledged property, though the tender is made after maturity of the debt.—HYAMS v. BAMBERGER, Utah, 36 Pac. Rep. 202.

111. TRESPASS—Title.— An action of trespass *quare clausum* can only be maintained where the plaintiff had title or possession at the time of the acts complained of.—HANLON v. UNION PAC. RY. CO., Neb., 58 N. W. Rep. 590.

112. TRUSTEES—Liabilities— Sale of Stocks.—A company being in danger of losing the services of two of its chief executive officers, and of falling into the control of a speculator, a trustee sold the stock owned by his trust for the best price then to be had. He himself, and other stockholders, desired to sell at the same price, and could not, and so remained, and by their good management, and the interest of the buyer of the trust stock, largely increased the value of the stock: Held, that the *cestuis que trustent* had no claim against him.—OWEN v. CAMPBELL, Mich., 58 N. W. Rep. 603.

113. TRUSTS —Express — Statute of Frauds. — Under Rev. St. 1894, § 3391, requiring trusts, not implied by law, to be created in writing, signed by the donor, a parol trust in the absolute grantee of realty to convey half of it to a younger brother, then a minor, on his demand when of age, is void.—PETERSON v. BOSWELL, Ind., 36 N. E. Rep. 845.

114. VENDOR AND PURCHASER— Unrecorded Deed.—An unrecorded contract for the sale of land, made in good faith for a valuable consideration, takes precedence of the general lien of a subsequent judgment.—VALENTINE v. SEISS, Md., 28 Atl. Rep. 892.

115. WATER—Diversion.— A landowner who diverts the water of a stream flowing through his land into a ditch running through a porous soil, so that much of the water is lost by soaking through the bottom of the ditch, and the rest is lost at the end of the ditch,—the only benefit received being from the water that percolates sideways through the banks of the ditch,—is liable, in at least nominal damages, to owners of land further down the stream, since such use of the water is not reasonable irrigation.— SHOTWELL v. DODGE, Wash., 36 Pac. Rep. 254.

116. WILLS—Construction.—Testator gave the residue of his property to trustees in fee to hold "for the uses hereinafter mentioned," or sell the same and hold the proceeds for the "same uses;" "that is to say, that until they shall sell the same they shall hold and pay the rents thereof equally to and for" the use of certain of his daughters: Held that, as the equitable estate of the daughters was equal in duration to the trustees' legal estate, and as the devise of the rents to them carried an absolute equitable interest, it also vested in them an absolute equitable interest in the proceeds of the property after sale.—JOHNSON v. SAFE DEPOSIT & TRUST CO. OF BALTIMORE, Md., 28 Atl. Rep. 890.

117. WILL—Nature of Estate.—Testator gave his wife the interest of his estate, the residue to be divided equally among his daughters J, D, and M on the wife's death or remarriage, and, if D should die before the wife, D's part to go to her daughter R: Held, that on the widow's remarriage the gift to the daughters became absolute, and that the gift to D was not contingent on her surviving the widow.—SAVINGS BANK OF NEWPORT v. HAYES, R. I., 28 Atl. Rep. 966.

118. WILLS—Remainders—Vesting.—Testator ordered his executors to divide his residuary estate into as many shares as he should have children living at his death, or dead with issue surviving, and to hold one of such shares for each of the children living during his life, and then to convey and pay it over to his issue absolutely: Held, that the issue of a child living at testator's death took a vested remainder, subject to let in after-born children, or to be divested by death before the parent. The direction as to transfer to them at his death did not postpone the vesting till that time.—CAMPBELL v. STOKES, N. Y., 36 N. E. Rep. 811.

119. WILLS—Undue Influence.—In a contest as to the validity of a will it is error to refuse an instruction that undue influence is any means employed upon and with the testator by which, under the circumstances and conditions by which the testator was surrounded, he could not well resist, and which controlled his volition, and induced him to do what otherwise would not have been done.—CHAPPELL v. TRENT, Va., 19 S. E. Rep. 314.

120. WILLS—Undue Influence.—Where the probate of a will which unequally distributed testatrix's property among her children is contested on the ground that testatrix was mentally incompetent and was unduly influenced, it is proper to charge that testatrix, if of sound mind and not under undue influence, had the right to make an unequal distribution of her property.—TREZEVANT v. RAINS, Tex., 25 S. W. Rep. 1092.

121. WILLS — Vested Remainders.—Testatrix left a sum in trust, the income to be used toward the support of her son E during his life, free from E's control or indebtedness; after his death, to be divided among the children which E might thereafter have, or, should he die childless, to be divided among certain grandchildren of testatrix. E had two children thereafter, of whom one died before E: Held, that the legacy never vested in him, and after E's death the whole went to the surviving child.—CHERBONNIER v. GOODWIN, Md., 28 Atl. Rep. 894.

122. WILL—Vested Remainder.—Testator devised his estate to trustees, and directed them to pay the rents and profits to L, "and from and after her death the principal to be divided among such children of the said L who shall be living at a period not exceeding nine months after my decease, and, in default of such children, remainder to my heirs." W and three other children of L were living nine months after the death of testator, but W afterwards died before L: Held, that W's interest was vested, and on his death it passed to his personal representative.—IN RE MAN'S ESTATE, Penn., 28 Atl. Rep. 939.

123. WITNESSES — Cross-Examination.—In the cross-examination of a witness it is competent to interrogate him in regard to any interest, pecuniary or otherwise, and the extent of such interest which he may have in the result of the trial of the case in which he is testifying, as affecting his credibility.—BLENKERON v. STATE, Neb., 58 N. W. Rep. 587.

124. WITNESSES—Transactions with Decedents.—Under Gen. St. 1883, § 3641, which provides that no party shall testify, of his own motion, where the adverse party defends as heir, a woman who sues the children of her deceased husband to establish a trust in her favor is not competent to testify that certain letters written by the decedent were received by her in due course of mail, where such letters contain admissions confirmatory of her claim.—CARPENTER v. WARE, Colo., 36 Pac. Rep. 298.

125. WITNESSES — Transactions with Decedent.—Under Rev. Code, 1880, § 1602, providing that no person shall testify to establish his own claim against a decedent's estate, which originated during decedent's life-time, a party to an action for the possession of property cannot testify that decedent gave him the property.—COCKRELL v. MITCHELL, Miss., 15 South. Rep. 41.